

# **MIGRATORY BIRD TREATY REFORM ACT OF 1998**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON**  
**ENVIRONMENT AND PUBLIC WORKS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTH CONGRESS**  
SECOND SESSION  
ON

**H.R. 2863**

A BILL TO AMEND THE MIGRATORY BIRD TREATY ACT TO CLARIFY RESTRICTIONS UNDER THAT ACT ON BAITING, TO FACILITATE ACQUISITION OF MIGRATORY BIRD HABITAT

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SEPTEMBER 29, 1998

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## **MIGRATORY BIRD TREATY REFORM ACT OF 1998**

**TUESDAY, SEPTEMBER 29, 1998**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:58 a.m. in room 406 of the Dirksen Senate Office Building, Washington, DC, Hon. John Chafee (chairman of the committee) presiding.

Present: Senators Chafee and Graham.

### **OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator CHAFEE. Good morning, everyone. This is a meeting of the full committee. It's going to be a little hectic today because there's a series of votes on the Senate floor coming up at different times, so I want to move right along.

We'll hear testimony in H.R. 2863, the Migratory Bird Treaty Reform Act of 1998. This bill was approved by the House on September 14 by a vote of 322 to 90, and was referred to this committee. The bill has generated a great deal of debate and strong views from both sides, and this hearing is intended to educate the committee on these issues.

Let me say at the outset, while this bill is currently on the agenda for the business meeting scheduled for this coming Friday, that's only tentative pending the outcome of this hearing. To this end, I would like to hear from the witnesses any recommendations they may have for changing the bill in the event that we choose to proceed with it.

A bit of background on this bill, which amends the Migratory Bird Treaty Act: That law was enacted in 1918—I believe it was probably one of the very first environmental laws. It was enacted to implement the convention for the protection of migratory birds between the United States and Great Britain, which then had the treaty-making power for Canada. The law prohibits taking hunting and killing of migratory birds unless prohibited by the U.S. Fish and Wildlife Service, which has broad rulemaking authority.

Under this authority the Service has generally prohibited hunting with the aid of bait or over baited areas. The violation of this prohibition is a misdemeanor, and since the Act was passed 80 years ago, virtually all courts have interpreted misdemeanor crimes under the Act as strict liability crimes.

In 1978 the Fifth Circuit held, however, that before a hunter can be prosecuted for a baiting offense, it must be proven beyond a rea-

sonable doubt that the hunter knew, or should have known, that the area was baited. H.R. 2863 would adopt the standard from the Fifth Circuit as the law of the land. It would also make baiting a separate offense—in other words, instead of the strict liability, we would go and adopt the Fifth Circuit holding that before a hunter can be prosecuted for a baiting offense, it must be proven beyond a reasonable doubt that the hunter knew, or should have known, that the area was baited.

As I mentioned, this bill has generated a good deal of fervor and a motion on either side, and I look forward to this morning's testimony from our distinguished panelists.

Now, it's my understanding that Senator Cochran and Senator Breaux, both of whom serve on the Migratory Bird Conservation Commission and who have a great interest in this issue, will be testifying, and it's my intention to place them on the first panel. I don't see either of them here, however. So I will wait a few minutes for the arrival of the two Senators.

Senator Breaux introduced his own bill, co-sponsored by Senator Cochran, to address these issues, and that bill is pending before this committee.

Senator Cochran, why don't you take a seat right there and we'll be able to get started. I know Senator Breaux is on his way.

Senator COCHRAN. Good morning.

Senator CHAFEE. Good morning, glad to see you.

Senator if you could proceed, and then in the interim period—here's Senator Breaux now—so we'll start Senator Cochran, if you would please?

I want to welcome you both here.

Senator COCHRAN. Mr. Chairman, Senator Breaux is the principal author of this legislation. I'm here to indicate my support for this initiative. I am a co-sponsor of the legislation, and I'm very proud to be. I think it has a lot of merit, but if you will permit me, I will defer to my colleague from Louisiana.

Senator CHAFEE. All right, fine.

#### **STATEMENT OF HON. JOHN B. BREAU, U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator BREAU. Thank you, Mr. Chairman, and I thank my colleague from Mississippi, who has taken the brunt of the hurricane that we sent over there from New Orleans. We wish him the very best. It was really a major, major weekend for both of us.

I will be very brief, Mr. Chairman. This is legislation that I have been interested in for over 20 years. It has passed the House this year by a vote of 322 to 90, so the bill is over here in the Senate waiting for the Senate to take it up. I think we have an opportunity to do something that is consistent with good waterfowl management, and, at the same time, is good for the notion in this country that people are innocent until proven guilty.

First of all, this legislation makes the baiting of a hunting area illegal. That is not illegal today. I can go out and bait my fields and bait them everyday, and throw corn, and throw other things to entice migratory waterfowl on that property, and that is not illegal. What is illegal, and the only thing that is illegal, is hunting over a baited field. So, currently, the law does not cover the illegal bait-

ing, which I think should clearly be covered. Our legislation covers the baiting of a field to illegally entice migratory waterfowl to that area. So we make it illegal and it should be illegal.

What we have done, however, is also to address a problem that I think is very severe. It is fundamentally unfair to be able to hold someone criminally liable—not civilly liable, but criminally liable—for something that they did not intend to do or something that they had no reasonable knowledge of.

Currently, the Fish and Wildlife Service under its regulations makes someone criminally liable whether they knew, or should have known, that a field was a baited field. I think is just fundamentally wrong. Our legislation says that it is a crime if a person hunts over a baited field that they knew was baited or by the reasonable exercise of their actions should have known it was baited, then they would be guilty. So we changed the standard from one of strict absolute criminal liability to one that simply says that a person is guilty if they knew, or should have known, by the exercise of due and diligent activity that it was baited. Then they would be held criminally liable.

Now, the Fish and Wildlife Service will probably come—and I haven't seen their testimony, Mr. Chairman—but they'll come up here and say, "Well, that will make it too difficult to prove cases." Well, I'm sorry, but if they're going to go out and subject someone to potential criminal penalties and a criminal conviction with a maximum penalty of up to \$5,000 per offense and 6 months in prison, they should have an obligation of proving at least to the person who knew or should have known that the field in fact was baited for the purposes of hunting migratory waterfowl. I think that it is clear that our legislation, I think, is fundamentally fair and sound.

Let me give you just two quick examples:

The current baiting legislation require that the bait has to be removed for 10 days before someone could legally hunt over that field. Therefore, if bait is put down on the first day, and a guest hunter does not come to that property for 9 days later and the bait is removed after the second day, that person could be held criminally responsible subject to a criminal offense and a prison term for hunting over a baited field in which there was no bait for the previous 8 days. Now I think that is fundamentally wrong.

The second example is a situation in which a person has never been to someone's property to hunt, has never been to that county in their lifetime. They go to a hunting lodge or a hunting camp late at night. They get up early in the morning when it is still dark. The owner puts them in a duck blind of they've never been in their life—it is still dark. The sunrise comes and they start hunting; and then, lo and behold, the Fish and Wildlife Service comes up and nabs the person for hunting over a baited field.

Now, that person did not know it, that person had nothing to do with putting the bait down there and no exercise of reasonable actions on his part would have led him to believe that it was baited. I just think that when you're talking about criminal responsibility, the least we can do is to say that the person to be convicted either knew or should have known that it was a baited field.

Now, Senator Cochran and I both serve on the Migratory Bird Conservation Commission. I have been an active participant in

hunting organizations like Ducks Unlimited for years to try and increase the assistance in land and everything that is important and proper for migratory bird conservation and improvement of the quality of the population of birds. But I think that in this one case, unless Congress follows through and does what the House has done and presents a more leveled playing field, that we're missing a real opportunity.

Thank you for your consideration.

[The prepared statement of Senator Breaux follows:]

PREPARED STATEMENT OF HON. JOHN BREAUX, U.S. SENATOR FROM THE STATE OF LOUISIANA

Thank you for inviting me to speak in support of H.R.2863, the Migratory Bird Treaty Reform Act of 1998.

More than 80 years ago, Congress enacted the Migratory Bird Treaty Act, which implemented the 1916 Convention for the Protection of Migratory Birds between Great Britain, for Canada, and the United States. Since then, the United States has signed similar agreements with Mexico and the former Soviet Union. The Convention and the Act are designed to protect and manage migratory birds and regulate the taking of that renewable resource. They have had a positive impact, and we have maintained viable migratory bird populations despite the loss of natural habitat because of human activities. As a member of the Migratory Bird Conservation Commission, I recognize the importance of protecting and conserving migratory bird populations and habitat.

Since passage of the Migratory Bird Treaty Act and development of the regulatory program, several issues have been raised and resolved. One has not—the hunting of migratory birds “[b]y the aid of baiting, or on or over any baited area.”

A doctrine has developed in the Federal courts by which the intent or knowledge of a person hunting migratory birds on a baited field is not an issue. If bait is present, and the hunter is there, he is guilty under a doctrine of strict liability. It is not relevant that the hunter did not know or could not have known bait was present. I question the basic fairness of this rule.

I believe it is fundamentally unfair for the Federal Government to hold American citizens criminally liable for something they could not have reasonably known. Hunting over a baited field does not impose a civil penalty. The baiting regulation holds a person criminally liable—with all the negative implications of a criminal charge—in situations where the person could not have reasonably known that what he was doing or attempting to do was criminal.

The U.S. Fish and Wildlife Service believes this bill would make baiting offenses more difficult to prosecute. The Service believes it's more difficult to make a case if they have to prove that a hunter had actual knowledge of the bait, or that a hunter, with an exercise of reasonable diligence, could have become aware of the bait. My response is that we are talking about American citizens whose lives and families are being subjected to criminal penalties and prosecution. The maximum penalty is a \$5,000 fine and 6 months in prison. Making a case may become a little more difficult for the Service. However, I would suggest that, under this nation's bedrock principle that a person is innocent until the government proves him guilty, H.R. 2863 restores the appropriate balance.

Keep in mind that, under the Service's current baiting regulations, bait has to be removed from the area 10 days before you began hunting. In other words, if an area is baited on October 1 and the bait removed on October 3 and you happen to hunt there October 12 (9 days later), with absolutely no knowledge of what has happened October 1 through 3, you are strictly and criminally liable for hunting over a baited field. You may not have been in the country 9 days earlier, but you are guilty.

I represent the State of Louisiana, which is at the bottom of the funnel of most of the ducks coming through the Central and Mississippi Flyways. This is an important issue in my State. However, I would suggest that it is an important issue for all of us as Americans to make sure that the criminal laws of this nation are fair.

I do not want anyone to misunderstand me. I strongly support the Migratory Bird Treaty Act. We must protect our migratory bird resources from overexploitation. I would not weaken the Act's protections. I believe we should be as tough as we possibly can on people who knowingly violate our game laws. People who intentionally bait a field to attract migratory waterfowl should have the book thrown at them. This legislation would not change that.

Under this legislation, no person may take migratory birds by the aid of bait, or on or over bait, where that person knew or should have known the bait was present. The Migratory Bird Treaty Reform Act of 1998 simply removes the strict liability interpretation presently followed by most Federal courts. It establishes a standard that permits a determination of the actual guilt of the defendant. If the facts show the hunter knew or should have known of the bait, liability, which includes fines and possible incarceration, would be imposed. However, if the facts show the hunter could not have reasonably known bait was present, the court would not impose liability or assess penalties. This is a question of fact determined by the court based on the evidence presented.

Under this bill, the responsibility is still squarely on the shoulders of the hunter. The hunter must act reasonably. He must ask the host if the field is baited. He must go out on the field and conduct a serious search of the grounds looking for signs of bait.

The Migratory Bird Treaty Reform Act also makes the act of baiting unlawful. Right now, baiting is not illegal. Hunting over a baited field is illegal. This bill ensures that a person placing bait, or directing the placement of bait, to lure migratory birds to an area will be cited for baiting even though he or she is not hunting.

The Migratory Bird Treaty Reform Act will provide guidance to landowners, wildlife managers, hunters, law enforcement officials, and the courts on the restrictions on the taking of migratory birds. It accomplishes that without weakening current restrictions on the method and manner of taking migratory birds. It does not weaken protection of the resource.

Again, I thank Chairman Chafee, Senator Baucus and the members of this committee for the opportunity to be heard, and I urge everyone to join me in supporting the Migratory Bird Treaty Reform Act of 1998.

Senator CHAFEE. Well, thank you very much, Senator. If you could stay for a few minutes, I thought we would hear Senator Cochran, and then I had a couple of questions for both of you.

So, Senator Cochran, if you would like to proceed.

#### **STATEMENT OF HON. THAD COCHRAN, U.S. SENATOR FROM THE STATE OF MISSISSIPPI**

Senator COCHRAN. Mr. Chairman, thank you very much for this opportunity to appear before your committee.

This legislation would put in the statute the decision that was reached in 1978 by the U.S. Court of Appeals sitting in New Orleans in a case where they ruled that the strict liability application of the Fish and Wildlife's regulation relating to hunting over so-called baited fields could not stand the test of Constitutional protections afforded to us under the U.S. Constitution. And so since 1978 in the Fifth Circuit area—Mississippi, Louisiana and Texas—there has been a legal prohibition against enforcing regulation under this strict liability notion, which a reading of the statute would conclude is the purpose of this Fish and Wildlife regulation.

But, beyond that, it's felt from groups around the country that other States ought to enjoy the same kind of legal interpretation. In California we've received indications that it would be welcomed to have this statute approved because it would make uniform throughout the entire country then the same interpretation of the Federal Government's obligations and the restrictions of their power.

There are two other aspects of this that I think should persuade the committee that this is a good bill. It's different from the House bill in these additional respects, and we would encourage you to look at our bill and report it favorably to the Senate:

It tries to make a determination as to what is normal or usual agricultural practice and protect the right of landowners to engage in wildlife habitat management activities, as well as normal agri-



cultural practices without running the risk of being convicted under the terms of these regulations that the Wildlife Service has proposed and some new ones that are being considered.

One specific example—in our State there are 83,000 dove hunters, and in many sections of the State they plant winter wheat, and they have early sowing on top of the ground of wheat, some by aerial application. There are many who are worried that if they continue to engage in this aerial application of wheat, which is a normal agricultural practice, and doves are attracted to those fields, and hunters then engage in hunting in those areas, they will all be subject to fines and penalties under these regulations. And so the legislation would permit the State to have a role in certifying what is or is not a normal agricultural practice in the area that is subject to these regulations.

One other aspect we have in the law now is incentives for landowners to manage their lands, their privately-owned lands, for the purpose of attracting wildlife, for nurturing wildlife. We have the Wildlife Habitat Incentives Program, which I was pleased to author when we wrote the 1996 Farm Bill, and that has served to provide inducements to landowners to undertake the management of their lands to attract waterfowl, to attract migratory birds, to attract other wildlife and to sustain it.

There are many who concerned that if they engage in practices that do attract and make it a habitat that's attractive to wildlife, they're going to be accused of violating these regulations.

So there is work to be done here. I worry that we have seen the bill criticized unfairly by some who are just against hunting of any kind—nature, description, whatsoever. That force in our society is there, and we respect their views and their rights to speak out and say what they want on these issues, but the reality is we have a confusing set of laws right now and regulations, and some innocent people have been harmed by them and many others are worried that they will be, and that they will run high risk of violating the regulations unless this legislation is enacted.

So we hope that the committee will look carefully at it, and I would ask, Mr. Chairman, that my complete statement that points out these differences in situations in other States like South Carolina, California and Texas, people who have written in asking us to work hard for this legislation, be printed in the record.

[The prepared statement of Senator Cochran follows:]

PREPARED STATEMENT OF HON. THAD COCHRAN, U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Mr. Chairman, thank you for the opportunity to appear before the committee today. I am particularly pleased to join my distinguished colleague from Louisiana.

In November of last year, I joined him in introducing legislation to address problems that hunters in our states have experienced with the current regulations issued by the U.S. Fish and Wildlife Service concerning baiting.

The House of Representatives recently passed legislation dealing with the issue of strict liability associated with baiting. However, this is only one of the three issues addressed in the legislation proposed by Senator Breaux and me.

Currently, a hunter that is pursuing migratory birds who has no knowledge of a baited situation and who cannot reasonably determine the presence of bait (or that hunted birds are influenced by bait) can be cited by a law enforcement official. In other words, in an attempt to address intentional violators, the regulations compromise the truly innocent hunter.

The U.S. Court of Appeals for the Fifth Circuit, which includes the states of Louisiana, Mississippi, and Texas, has rejected a strict liability interpretation of the regulation, requiring at a minimum that the presence of bait could reasonably have been ascertained by the conscientious hunter. According to the court, strict liability renders criminal conviction "an unavoidable consequence of duck hunting." [*United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978)].

I agree with the House that since the Migratory Bird Treaty is an international agreement, the regulation should be available to all states, not just my state, Senator Breaux's state, and Texas. I support the House language, which is also a component of our bill.

The House and Senate version's were basically identical in the beginning, but due to time constraints, only strict liability was addressed in the House version. Our bill also addresses two other very important issues.

Active management of native vegetation occurs throughout the United States, but is most common in California's Central Valley, marshes of the Great Lakes, and Mississippi River habitats in Illinois and the surrounding states. In the rice prairies of Texas, the Lower Mississippi River Valley, and the Low country of South Carolina, moist-soil management is the single, most important practice used to improve natural habitat for waterfowl and other migratory birds.

According to the International Association of Fish and Wildlife Agencies, practices such as water-level manipulation, water circulation techniques, impounding water, ditching, salinity control, mowing, shredding, discing, roller chopping, grazing, burning, trampling, flattening, herbicide treatment, and wetland-associated plant propagation techniques do not create the kind of lure or attraction to waterfowl typically associated with the dumping of grain.

However, the manipulation of native vegetation by waterfowl biologists, landowners, and hunters has placed waterfowl hunters in jeopardy of violating current regulations. According to Bill Gaines, Director of Government of Affairs of the California Waterfowl Association, "Confusion over the meaning and enforcement of these regulations is compromising the willingness of many landowners to employ preferred waterfowl habitat management practices on their lands."

Eric Frasier, Executive Director of the Wetland Habitat Alliance of Texas, states, "These native and agricultural plant communities are vital in meeting the nutritional needs of waterfowl and other wetland-dependent birds." He also states that such an interpretation discourages wetland managers, landowners, and hunters from conserving, restoring, and/or enhancing natural wetlands. The legislation we introduced in the Senate would preserve landowners' ability to manage wildlife habitat without the threat of prosecution.

The third area our bill addresses is that of agricultural practices. This provision primarily affects migratory game birds other than waterfowl—such as doves.

The major problem with enforcement of dove baiting regulations has been the lack of a uniform understanding among landowners, farmers, and hunters as to what constitutes "a bona fide agricultural operation or procedure," "agricultural planting," or "soil stabilization practice." Landowners and hunters need clarification in terms of what practices meet these definitions, which may vary substantially in various parts of the country. Our Bill simply allow state fish and wildlife agencies to determine what is "normal," or "bona fide" with respect to these practices.

We have about 83,000 dove hunters in my State of Mississippi. According to the March 25, 1998, Federal Register, "The (U.S. Fish and Wildlife) Service is proposing a prohibition that would apply to the hunting of all migratory game birds (including doves) over any area that has been planted by means of top sowing (including aerial application) where seeds remain on the surface of the ground as a result. The Service is proposing that this prohibition apply regardless of the purpose of the seeding, and proposes to explicitly exclude top sowing from the proposed definition of "normal agricultural and soil stabilization practice." In a letter I received yesterday from John Frasier, Executive Director of the Wetland Habitat Alliance of Texas, this one practice is vital to supporting our waterfowl populations.

Let me conclude Mr. Chairman, by saying that there is a tremendous amount of misinformation about the bill we have proposed and is pending in this committee. A leaflet circulated by the Humane Society of the United States opposing this legislation wrongly states that it will increase the annual waterfowl harvest by hunters. There are some who don't want any hunting and will say anything to further their cause. I will not give credence to this statement other than to reemphasize to you it is wrong.

I very much appreciate the opportunity to appear before the committee. I support the bill passed by the House. However, our bill, S. 1533, the Migratory Bird Treaty Reform Act, addresses all three issues that hunters and landowners face. I hope you will act on it favorably in the remaining days of this Congress.

Senator CHAFEE. Thank you both for your testimony. I've got several questions here. First, I do want to say about that 1996 Farm Bill that I think it was one of the great environmental bills that was passed around this place. I don't think it ever got the credit it deserved. I remember Senator Dole was active in its passage. I never thought those folks who were involved with that legislation got the credit for the environmental aspects of it that were there. In setting land for habitat in that Farm Bill there were more acres set aside for habitat than we've set aside in our wildlife refuges, for example.

Let me ask you some questions that are going to come up. Senator Breaux pointed out that there will be views from the other side in the latter panels. One of the points raised will be, "Well, we're starting out on a slippery slope here. All right, so you're just dealing with baiting but in the Migratory Bird Act there's a series of other strict liability provisions, and if you get back from the strict liability on the baiting, what follows next? Are you going to be in here for something else in connection with other provisions of the Migratory Bird Act?"

Senator BREAUX. Mr. Chairman, all the provisions should stand on their own. If they can be defended as strict liability on their own, they should stand and stay. This is very narrow. It only addresses baiting and that's where the problem is. I just think it is fundamentally wrong to say that you can convict someone of a criminal offense who had no knowledge of what was happening. The only thing we're addressing is baiting. We expand the criminal liability of baiting because we make it, for the first time, a crime to bait a field, which is not a crime today. A landowner can go out there and do everything that I would consider illegal and throw bait all over his field to attract migratory waterfowl—that's not a crime. But you take an innocent hunter who has never been to that property, who has no way of knowing or should have known that it was baited, and he's going to be convicted. I mean, that's wrong. Let's make the person who owns the land more responsible, let's make the person who actually does the baiting—throw the book at him, but, for heaven's sakes, let's say to the innocent hunter who has never been to the property before and has no way of knowing it was baited—make them prove that he knew, or at least should have known, by an exercise of reasonable precaution that it was a baited field.

Senator CHAFEE. Now, is this really a major problem?

Senator BREAUX. It is for the person being convicted.

Senator CHAFEE. Are you aware of any criminal prosecutions that have taken place under these strict liability provisions, and, thus, unfairness has occurred?

Senator BREAUX. It happens every month. The last couple of months or so the sheriff of Jefferson Parish in Louisiana was convicted of hunting over a baited field in my colleague's State of Mississippi—a place he had never been to in his lifetime. It happens all the time, Mr. Chairman. I know good friends that have had this happen to them, who have never had any knowledge that a field was baited. If it only happens one time, for the one time that it happens to a person who gets a criminal conviction on his record, it's too much.

Senator CHAFEE. What about the experience in the Fifth Circuit, as far as the effect on wildlife, on waterfowl, on migratory birds, for example? Has it resulted in lodge takings? What has been the experience? I mean, there in the Fifth Circuit you've got what you're seeking under this legislation. What has been the result as far as the——

Senator BREAUX. Thad will have to comment on that because I'm not aware of the fact that people in the Fifth Circuit—I mean, they're still in charge, they're still prosecuted and they still have to go through the expense whether they're in the Fifth Circuit or not.

Senator COCHRAN. Everybody doesn't have the money, the resources and the inclination to take all these cases to the Fifth Circuit or to a higher court. The fact of the matter is that the practical side is a fine—it's a small fine sometimes—and people pay it, forget about it, and hope that it's not in the newspaper. It's an embarrassing situation. A lot of people who are prominent, a lot of people who are hardworking folks, don't have time to do anything but do their work and go to their job. They don't have the time to take on the Federal Government and litigate all these things.

Senator CHAFEE. In other words, even though the Fifth Circuit has made its determination—I think it was in 1978?

Senator COCHRAN. That's correct.

Senator CHAFEE. And, presumably, that's the law of the Fifth Circuit. Nonetheless, people are still prosecuted under the existing regulations of the Fish and Wildlife Service?

Senator COCHRAN. That's my understanding.

Senator BREAUX. Let me add to that, Mr. Chairman, that in the report from the House, which had testimony from people based on exactly that question, it said, "The Fifth Circuit includes the States of Louisiana, Mississippi and Texas where migratory birds are hunted in great numbers. The record indicates that this legal standard has in no manner lessened the conviction of persons who by the evidence presented have violated the baiting provisions."

For example, based on information supplied by the U.S. Fish and Wildlife Service and the most recent hunting season, 1996 and 1997, in Louisiana, of the 52 people cited by the Service for hunting over a baited field, 43 were still found guilty. And in Mississippi in 1995, the most recent year, they had numbers—22 baiting citations and all 22 cited persons were found guilty.

It is still a very serious problem, and it's a serious problem not only in the Fifth Circuit—it's a serious problem all over the country.

Senator CHAFEE. You mentioned the differences between the House Bill. In other words, my question is the Breaux bill in the Senate differs in what manner from, let's say, the bill that was passed in the House? You mentioned there were differences, and I'm not sure I understood those.

Senator COCHRAN. Let me tell you what the House did. I have a letter here from the Delta Wildlife Foundation in Mississippi, which I received in June, and it says, "The House of Representatives has stripped their bill of the most important provisions." These are pertaining to the top sowing of wheat for dove hunting, which I mentioned, and moist soil management for duck hunting.

Now, we talked about wildlife management practices. The House did not choose to include those provisions that are in the Breaux-Cochran Bill in the bill that was passed in the House, so that's why—

Senator CHAFEE. Those provisions were the State certifying—

Senator COCHRAN. Right, the State would certify what is the normal farming practice and try to protect people who engage in those practices and keep them from being convicted of violating the law when what they're doing is a normal top sowing of wheat—I used that as a specific example and there may be others. The other thing is managing your property, your private land, for the purpose of increasing its attractiveness as wildlife habitat. We're encouraging people to do that. The Federal Government is providing financial incentives to landowners to achieve that result, and what they're now worried about is that under a strict reading of some of these proposed legislation and existing rules of the Fish and Wildlife Service, those landowners can be charged and fined for enticing habitat if you also engage in hunting on those lands.

So it really needs the attention of Congress to sort this thing out. The Fish and Wildlife Service is just being simply too aggressive when hunting is involved in areas where the practices being undertaken are lawful, even encouraged and rewarded by the Federal Government, but if you hunt in those areas, then you're liable of being convicted of a crime.

[The referenced letter follows:]

DELTA WILDLIFE FOUNDATION,  
Stonesville, MS, June 30, 1998.

THE HONORABLE THAD COCHRAN,  
U.S. Senate,  
Washington, DC 20510.

DEAR THAD: We are very excited about you co-sponsoring the Migratory Bird Treaty Reform Act (S. 1533). The bill, as you have sponsored it, is very beneficial and will go far in solving the problems of clarifying the baiting regulations, which at this time are very vague.

The reason we are writing is because the House of Representatives has stripped their bill of the most important provisions (those pertaining to the top-sowing of wheat for dove hunting and moist soil management for duck hunting); their bill only addresses "strict liability," which is not a problem in the states of Louisiana, Mississippi, and Texas.

The major problem with enforcement of dove baiting regulations has been the lack of a uniform understanding among farmers and hunters as to what constitutes "a bona fide agricultural operation or procedure". This problem has existed since 1972 when the baiting regulations found in 50 CFR 20.21(i)(1)(2) were first promulgated. Under this provision, no person shall take migratory game birds by baiting (placing feed such as corn, wheat, salt, or other feed to constitute a lure or enticement) This section, however, does not prohibit taking migratory game birds over grain crops scattered solely as a result of normal agricultural planting or harvesting or as a result of "manipulation of a crop or other feed on the land where grown" for wildlife management purposes.

In Mississippi, the enforcement of the above provisions has been interpreted since 1972 as permitting the practice of top-sowing wheat as long as the procedure followed normal agricultural practices. Consequently, farmers and dove hunters have "preparedly dove fields over the years by topsowing wheat following procedures which conform to normal agricultural practices.

The U.S. Fish and Wildlife Service's (USFWS) Law Enforcement Division has changed their interpretation of this regulation and has now taken the position that the "preparation of a dove field" by top-sowing wheat solely for the purpose of hunting doves is prohibited.

This Foundation has several problems with changing the method of enforcement, to include, the historical practice of allowing hunters to prepare dove fields, the lack of a definition of "bona fide agricultural operations or procedures," and the fact that

the U.S. Department of Agriculture recognizes the top-sowing of wheat as a bona fide agricultural practice.

If changes are to be made in the enforcement of dove baiting regulations, then the dove baiting regulations need to be changed to be more specific. Changes in the regulations do not need to be made unless a resource need is identified. None has been identified, and if it were, bag limits and day length (full day or one-half day) should be tools to regulate harvest.

Regarding waterfowl, a concern relates to the practice of opening water for blind and decoy placement where native vegetation (moist soil plants) has to be "knocked down" in the process. The USFWS says that this makes seeds from native vegetation more available, therefore creating a lure. In the South, native vegetation would have already dropped its seed well before the duck season begins; therefore, the seed is already available for use by ducks.

When someone opens a hole of water in native vegetation just prior to the season, he or she may be "knocking down" the vegetation and actually covering the seed with plant debris; therefore, the seed is not more available. Ducks can find places to land regardless of the open water created for decoy and blind placement. Since blinds and decoys are an integral part of waterfowl hunting, we do not consider this to be an unusual lure, especially when considered in the context of waterfowl hunting methodology. Also, current regulations prohibit active management of native vegetation for waterfowl and other migratory birds.

The real critical success factors for improving waterfowl populations are habitat abundance and quality. The support base for enhancing waterfowl habitat is the farmer. Partners For Wildlife, the Wetland Reserve Program, and the Wildlife Habitat Incentives Program are providing additional waterfowl habitat on farmland in the Delta. If the USFWS is truly interested in maximizing waterfowl habitat, as we are, then they should avoid sending the kinds of signals that will diminish farmer/hunter support for enhancing the future of waterfowl according to the North American Waterfowl Management Plan.

Your bill will solve both of the above problems. We are extremely pleased that you are a cosponsor of the Migratory Bird Treaty Reform Act. We hope that you will maintain the provisions pertaining to the top-sowing of wheat for dove hunting and moist soil management for duck hunting. We look forward to further discussing these issues with you if you so desire.

Sincerely,

CLARKE REED,  
*President.*

Senator BREAU. Mr. Chairman, the House just took Section 3 of our bill, which changes the standard or the burden of proof from what it is today of strict absolute liability, and they took our standard, which says, "For a person to be guilty, he knew, or should have known, that it was a baited field." That's, basically, what they passed.

Our bill tries to spell out normal agricultural practices, farming practices, which are exempt. If a person is farming corn on his crop and using normal farming practices, that's not baiting a field, and we've tried to spell out what is normal farming agricultural practices.

Senator CHAFEE. One final question, and then Senator Graham, I'm sure, has a couple of questions.

One thought that we had was possibility sunsetting—enacting the change as you suggested with a sunset provision to see how it works out. In other words, are there going to be—is the bag going to be greatly increased, the number of waterfowl or whatever they might be—pheasants or whatever they might be? Are they going to be—is the taking going to be greatly increased? I don't know.

Senator COCHRAN. We don't have any statistics, and there's probably no way to know that. People are going to guess and speculate. We've had difficulty in the wildlife—in the Migratory Bird Conservation Commission in this North American Waterfowl Plan trying to assess the impact of all these conservation practices and the

protection of habitat. As you know, all the duck stamp money that hunters contribute to the government through the purchase of those duck stamps are used by the Commission to acquire by lease or purchase habitat to nurture the continued development of migratory wildlife—and ducks, in particular.

But we hear that last year, for example, there were some 90 million ducks in the Mississippi fly-way huge numbers that we keep hearing are being increased, and we hope we continue to see that develop and that we can balance the interest of those who are engaged in hunting and who do that—it's a lawful activity—with the need to protect those same migratory waterfowl.

We think this would be in the same spirit of the law. We're encouraging the development of habitat. We're trying not to unfairly punish those who are engaged in normal agricultural practices.

What we don't want the Fish and Wildlife Service to do is insist that every time somebody engages in practices that nurture the development of wildlife habitat, that they have to treat that land as a wildlife refuge. In other words, you're prohibiting—and that's what I think the applications of these regulations would do, as a practical matter—you would prohibit by placing the risk of being fined and convicted of violating the rules and the laws so high that you're going to ensure that there's no hunting that takes place in areas where you have top sowing of wheat or in areas where an otherwise normal agricultural practice attracts doves or ducks. In some parts of the country where you're preparing duck blinds and that kind of resource for duck hunting, if you knock down the vegetation, you're considered distributing the seeds in plants in the area, and that creates a bigger attraction for the ducks to come in. And so you're guilty of baiting, or attracting or unlawfully enticing the waterfowl to come to that spot. Whereas, in order to have a duck blind there, you've got to get into the area and prepare it.

So the net effect is to indirectly create a wildlife refuge on private land, and we think if that's the net result, some people will applaud that, and I think that's what's driving these new initiatives. But it puts at risk a lot of innocent people, a lot of law abiding people who are engaged in hunting.

Senator BREAUX. Mr. Chairman, on the sunset question, sunseting would be better than what we have now. I think that just as we have an interest of protecting migratory birds, we also should have an interest in protecting innocent hunters. Our legislation does not make the Fish and Wildlife Service have to prove that a hunter actually knew—only that they should have known. It puts a responsibility on the hunter. He can come in and show that, "Look, I checked. I asked the landowner, I did a walk-through and I couldn't find any bait. If it was there, I did not know it, and no reasonable person would expect me to know it. I checked—I did some things."

So if the committee feels like it's necessary to sunset it, that is certainly much better than we have right now, and then check to see whether it has an adverse impact on migratory waterfowl.

Senator CHAFEE. As you know, or perhaps you didn't know, we reported out from here the reauthorization of the North American Waterfowl Conservation Act, which, as you recall, has been a tremendous success. Yes, the increased rains over the past several

years have helped the ducks come back to the extent that you pointed out, Senator Cochran, but I think that this Act has been a tremendous plus.

We're having a little trouble getting it up, and so if there is any way you might be helpful in that, I will let you know where the roadblocks seem to be and would ask for your help.

What do you think about the maximum fine that now exist? Let's say we followed your provision and got rid of the strict liability. The maximum fine now is \$5,000. How do you view that?

Senator BREAUX. I think if someone is intentionally baiting, you should throw the book at them. I mean, that is something that is illegal, they know it's illegal and they're doing it anyway. You should throw the book at them. I mean, I would raise the fine, and as long as it's "up to", and let the judge have some discretion in assessing it, based on whether it's a first offense or what have you, or how serious it was and how much damage was done. But, I mean, the fine, I'm not advocating that it be lowered. If anything, go ahead and raise it, as long as you change the standard from one of strict liability.

Senator CHAFEE. Senator Graham?

**OPENING STATEMENT OF HON. BOB GRAHAM,  
U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator GRAHAM. Thank you, Mr. Chairman.

I don't have any questions. I would like to file an opening statement and make a short comment as to how this matter came to my attention.

Back in 1995 the Florida Sheriff's Youth Ranches, which are institution that serve troubled and delinquent children, was having its annual charity shoot in a county in the Big Ben area of Florida called Dixie County. During the course of the charity shoot, there was a raid made by the Fish and Wildlife Service, which resulted in 80 citations. A number of those citations were given to students at the University of Florida who were there through their fraternity's public service outreach not to hunt, but rather to prepare the food and participate in the other activities, which supported the charity shoot for the Florida Sheriff's Youth Ranches.

One of those young men lost his Army officer's commission as a result of getting this citation. These individuals all had no recourse or defense against enforcement actions because of the strict liability nature of the current law.

When I was made aware of this, I became concerned at the unfairness of this and the unintended negative consequences, especially on these students. So I support the legislation that Senator Cochran and Senator BreauX bring to us today. I believe that it would provide for an opportunity for those people who were knowingly, or should have known, that they were participating in a baited field hunt to be punished, but not sweep up a lot of innocent folks who just happen to be standing around at the time that this event that was beyond their knowledge or their reasonable expectation that they would have knowledge are currently being punished.

So, Mr. Chairman, I support this legislation and hope that we can report it to the Senator for consideration at an early date.

[The prepared statement of Senator Graham follows:]



PREPARED STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM THE STATE OF  
FLORIDA

Mr. Chairman, thank you for the opportunity to address the committee on such an important issue.

Today we are looking at a piece of legislation that is fairly straightforward. It addresses the concerns of hunters throughout the nation that existing enforcement provisions give the Fish and Wildlife Service the authority and the discretion to give citations to any person found hunting on or within a mile of a baited field whether or not there is any evidence to demonstrate that the individual was aware of the condition of the field. By adopting a "known or should have known" standard for enforcement as opposed to a strict liability standard for enforcement, this legislation will offer these individuals an opportunity to defend their actions and demonstrate whether or not they knew of the condition of the field. In addition, this legislation adopts a new provision which makes baiting itself a separate offense, thereby offering an additional protection both for the migratory birds as well as for hunters.

This issue has strong ties to the State of Florida. In 1995, the Fish and Wildlife Service in Dixie County, Florida issued over 80 citations to individuals attending a charity shoot for the Florida Sheriff's Youth Ranches. At the same time, several students participating in the event were also issued citations, resulting in the revocation of an Army officer's commission for one student. These individuals had no recourse or defense against the enforcement actions by the Fish and Wildlife Service.

With that said, I understand that this is not an action that this committee should take lightly. Congress passed the Migratory Bird Treaty Act in 1918 which implemented the Convention for the Protection of Migratory Birds, a treaty signed by the United States and Great Britain for the protection of migratory birds. This law made it illegal to "hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale" bird species including ducks, geese, brants, coots, gallinules, rails, snipes, woodcocks, crows, and mourning and white-winged doves. In 1935, the Fish and Wildlife Service issued regulations for baiting which prohibit hunting over baited areas, except where grain has been scattered through bona fide agricultural operations.

There is a long history of congressional intent to protect these migratory bird species. It is our challenge today to develop a policy that will continue this long-standing commitment while also creating a rational, reasonable policy that will provide fair and equitable treatment to those individuals who choose to hunt within the existing rules.

I look forward to hearing the testimony of today's witnesses which I hope will describe the nuances of the decision we face today.

Senator BREAUX. Senator Graham, if you would yield, the person in your example who actually baited the field would not be guilty of anything because baiting the field is not illegal, but hunting over the baited field is.

Senator CHAFEE. Thank you both very much for coming. We appreciate it, and we certainly will try to move along with this legislation.

Mr. Kevin Adams, Chief, Office of Law Enforcement, U.S. Fish and Wildlife Service, Department of the Interior.

Mr. Adams, if you would come forward, we'll proceed with your testimony.

Won't you proceed?

**STATEMENT OF KEVIN ADAMS, CHIEF, OFFICE OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR**

Mr. ADAMS. Good morning, Mr. Chairman, and members of the committee.

I am Kevin Adams, Chief of Law Enforcement for the U.S. Fish and Wildlife Service. I would like to thank you for the opportunity this morning to discuss the Administration's position on H.R. 2863,

the Migratory Bird Treaty Reform Act of 1998, as passed by the U.S. House of Representatives.

As passed, this bill would eliminate the current strict liability standard used in enforcing waterfowl baiting regulations and make it illegal for any person to place or direct the placement of bait on or adjacent to an area being hunted.

The Department of the Interior shares your concern for the need to clarify and simplify migratory game hunting regulations regarding baiting. On March 25, 1998, the Fish and Wildlife Service published in the Federal Register for public review and comment a proposed rule concerning hunting migratory birds by baiting or using baited areas. This rulemaking process was initiated after extensive review of the current regulations and in response to public concerns about interpretation and clarity of those regulations, especially with respect to current migratory bird habitat conservation practices—that is moist soil management techniques. The Administration believes that H.R. 2863 will disrupt the agency's ongoing decision-making process and is opposed to this bill.

The Migratory Bird Treaty Act, which implements international treaties with four of our neighboring countries for protection and conservation of migratory birds, authorized the Secretary of the Interior to determine by regulation when, to what extent, if at all, and by what means it is compatible with the terms of the Convention to allow hunting. These Federal baiting regulations were first established in 1935 when waterfowl populations suffered from drought, degradation of habitat, and over-harvest by hunting.

The two hunting practices primarily responsible for over-harvest were the use of bait and live decoys, both of which are quite effectively luring birds to the gun. Of all the factors affecting migratory bird populations, these two can be controlled or curtailed by law enforcement actions.

Enforcement of the baiting regulations includes a strict liability doctrine. Under strict liability, the government does not need to prove that the hunter knew he or she was violating the law. H.R. 2863, as passed by the House, would eliminate this strict liability standard and replace it with a "know or reasonably should have known" standard. This new standard will require Service law enforcement officers to prove that a person knows, or reasonably should have known, that the area where he or she was hunting migratory birds was baited before it can establish that a violation occurred.

This bill will also include this language in the Migratory Bird Treaty Act, rather than in the Code of Federal Regulations where the prohibitions are listed today.

This concludes my statement, and I would be glad to answer any questions.

Senator CHAFEE. Well, thank you, Mr. Adams.

You were here when the two Senators testified just before you. My question is, is there any documentation of experiences under the Fifth Circuit where there's over-harvest as a result of the change in the burden of proof that took place as a result of the Fifth Circuit, or is that impossible to quantify because the Fish and Wildlife—people have just gone and paid their fines, not taking it up into the courts, having appealed?

Mr. ADAMS. Mr. Chairman, the Fish and Wildlife Service first started collecting data at a central location in 1984, and these data reflect the number of citations that were issued, as well as the number of individuals who paid their citations through forfeiture of collateral, or through the more formal process—by appearing before a U.S. Magistrate.

However, we have nothing to place these 1984 and beyond statistics in context to what may or may not have happened at the time that *Delahoussaye* was adjudicated in the Fifth Circuit. We simply don't have the mechanism to measure the impact on migratory birds.

Senator CHAFEE. Somebody suggested that if the harvest is greatly increased as a result of this change in the baiting, then the bag limits would be changed or the season limits would be changed, and they come up for review every year anyway.

What would you say to that?

Mr. ADAMS. The Fish and Wildlife Service in working with the States utilizes adaptive harvest management, and, in fact, if the bird populations fell to a set level, the bag limits and the season limits would be adjusted to reflect that.

Senator CHAFEE. After listening to Senator Breaux, it seems to me he makes a pretty good case. If somebody goes out on a Friday night, goes up to some duck hunting club, arrives in the evening, goes out early in the morning to a duck blind and there shoots ducks, and later is told that, in no way he would know it, that there had been baiting going on—even though the person was completely innocent and had no desire to evade the law, that under the strict liability provision, whether he knew it or didn't know it, tough luck—could be fined. The current maximum fine is up to \$5,000.

Doesn't that strike you as a bit unfair?

Mr. ADAMS. Well, Mr. Chairman, our common field situation involves hunters of all different ability, length of time in the field and expertise. In many instances, hunters have claimed not to have known that the area was baited. However, upon further review it becomes apparent that they did not exercise any responsibility to go out and check an area. This responsibility, which is reflected in the known or should have known standard, is something that this new legislation tries to address.

So I can't say categorically that these situations never happen because there are always exceptions, but the State officers, the Federal law enforcement officers, use discretion, and the prosecutors use discretion in bringing these cases to court. We feel that such discretion adequately addresses the need.

Senator CHAFEE. Well, in the law the proposed provision of Senator Breaux and Senator Cochran it has "known, did know or should have known"—it has that provision in there. Was that what you were referring to?

Mr. ADAMS. Yes, sir.

Senator Graham?

Senator GRAHAM. Well, let me understand what the Fish and Wildlife Service's position is.

Do you support or oppose changing the standard from the current strict liability to a "know or should have known" standard?

Mr. ADAMS. Mr. Graham, in March of this year the Fish and Wildlife Service released a proposed rule, and it includes a number of revisions to the current migratory waterfowl baiting prohibitions. Many of those were contained in the earlier version of the House bill; many of those still remain in the Senate bill.

We feel that it's premature at this time to make a change in strict liability because we still are receiving comments. That period closes October 22, and at that point we will do an analysis of comments and publish a final rule.

Senator GRAHAM. Well, as the agency responsible for implementing this action, what is your recommendation?

Mr. ADAMS. Again, sir, the agency does oppose the bill primarily because we have the rulemaking process ongoing at this time. It's a vital part of that rulemaking process.

Senator GRAHAM. So is it fair to say your opposition is based on procedural grounds—i.e., that you are in the midst of rulemaking, which might result in a change from the strict liability standard and your opposition is not based on a policy commitment to the strict liability standard?

Mr. ADAMS. The Administration's position is that it is based on a procedural standard. However, as the Service clearly outlined in the proposed rule, we have considered the requested change from a strict liability to a "known or should have known" standard, and at the time of the proposed rule we chose not to make any changes.

Senator GRAHAM. And what was the basis for the decision not to make any changes?

Mr. ADAMS. The Service has been enforcing these baiting regulations for over 60 years, and the strict liability standard has proven very effective for migratory bird conservation.

Senator GRAHAM. As someone who used to be involved in State law enforcement, I can appreciate why strict liability is an easy to enforce standard. You have to exercise any judgment. You see somebody in a situation which is prohibited and they're guilty without any other questions asked.

We've had presented today some cases which seem to raise fundamental issues of due process and basic fairness in applying that. I would go back to my example of the students who came to assist in a charity hunt and then ended up being swept up in a number of citations that were issued against all people who were physically on the property, and some very serious negative consequences flowed to those persons who did not know, and had no reason to know, that the field had been baited, if in fact it had been baited.

I don't understand why the Service would feel that such an arbitrary application of the law would be necessary for it to carry out its function of determining whether people were knowingly taking advantage of the illegal baiting on that field. I mean, the trade-offs between the injustice to the innocent against the admittedly greater efficiency to the Service of being able to arrest everybody who is standing around doesn't seem to me to be an equitable balance of justice.

Mr. ADAMS. Senator, I would hope that we simply do not arrest everyone who is standing around a baited dove field. I know there has been testimony on previous occasions before the Congress on this particular incident, and the issues you raise are certainly ones

of great concern to the Fish and Wildlife Service and the State and Natural Resource Agencies. We work with our law enforcement officers on a regular basis to ensure that they in fact do use discretion and don't seek a simple means to take care of a problem.

I think we've made great progress in the past few years in this year.

Senator CHAFEE. Mr. Adams, what is your schedule here? They just sounded the latter part of the second half of the vote. There's a series of votes over there, and I'm afraid we're going to be tied up perhaps for as long as—I think there are three votes, and so it might take us a half an hour.

Can you wait here? I have a couple of questions for you?

Mr. ADAMS. Yes, sir, certainly.

Senator CHAFEE. All right, I would say to the balance of the witnesses inadvertently—I mean, this situation is beyond our control. If you could all wait here and I will make every effort to come back as soon as I can.

So we'll recess this hearing for about—it will be about an half hour, hopefully short of that.

Thank you.

[Recess.]

Senator CHAFEE. All right, if Mr. Adams would come back up? I apologize for the long delay. Three votes took not 30 minutes, but took nearly an hour, and, indeed, they're not through the third vote yet.

Mr. Adams, one of the problems that we have is it is my understanding that the Fish and Wildlife Service started this review of the regulations, and, indeed, in connection with this particular subject, in 1991 and here we are in 1998 and you say, just wait; October is coming and something will come out then.

What do you say to the skeptics that say it takes an awful long time for you folks to get these things done?

Mr. ADAMS. I would certainly have to agree that 1991 was more than just a little while ago. We have taken a number of steps since then. 1991 was the initial review process that the Service went through. In 1996 we went out to the International Association of the Fish and Wildlife Agencies and requested their assistance in establishing an ad hoc committee to come back to the Service with recommendations, and, in fact, in 1997 they did come back and we used those recommendations as part of our process in developing our proposed rule.

So this is going to happen. The Director is committed to getting a final rule published as soon as practical after the comment period closes.

Senator CHAFEE. I asked Senator Breaux about his views on the increase in the penalty, should we make this change, and it will be on a sliding scale—in other words, it wouldn't be a flat \$5,000 or \$6,000 or whatever. Currently, it's \$5,000 maximum, and the court has the ability to go—I don't know what the minimum is, but what do you think about increasing the penalty? Should we adopt language similar to that that Senator Breaux submitted or something similar to it? What would you say about increasing the penalty?

Mr. ADAMS. Mr. Chairman, of course, the decision on the amount of penalty is at the purview of the courts, but Federal law enforcement officers I think in the Service would see that as, again, another tool to use. If, in fact, we are going to make some true distinctions for different levels of responsibility for baiting violations, that's one effective way to do it.

Senator CHAFEE. All right, well, thank you very much for coming up, Mr. Adams. I'm sorry there was that long delay.

Mr. ADAMS.

Senator CHAFEE. Now we'll have the final panel—Mr. Doug Inkley, Senior Scientist and Special Assistant to the President, National Wildlife Federation—if you gentlemen would come up?

Ms. Tanya Metaksa, Executive Director from the National Rifle Association; Ms. Laura Hood from the Defenders of Wildlife; and Mr. Brent Manning from Illinois on behalf of the International Association of Fish and Wildlife Agencies.

Will take people in the order that I read them off, and Mr. Inkley, if you would proceed?

**STATEMENT OF DOUGLAS B. INKLEY, SENIOR SCIENTIST AND SPECIAL ASSISTANT TO THE PRESIDENT, NATIONAL WILDLIFE FEDERATION, VIENNA, VA**

Mr. INKLEY. Thank you, Senator Chafee. On behalf of the National Wildlife Federation, we appreciate this opportunity to testify today.

As you know, the National Wildlife Federation is the nation's largest conservation education organizations. We have had a long-term interest in the conservation of the migratory bird resource. We have worked with the U.S. Fish and Wildlife Service to help phase out toxic shot for waterfowl hunting because of the indirect mortal caused to birds through poisoning, and we have also worked to support the North American Waterfowl Management Plan, the North American Wetlands Conservation Act, and the 404 Wetlands Regulatory Program.

I mention those simply to demonstrate that we do have a very strong interest in the conservation of the migratory bird resource.

The National Wildlife Federation is here today not only because of our interest in the conserving of the migratory bird resource, but also in ensuring that there is properly regulated utilization of that wildlife resource. Hunting is certainly inappropriate activity for utilization of the migratory bird resource when properly regulated.

Of course, the issue today is baiting, so I will go directly to that. The baiting of waterfowl and other migratory birds has long been illegal under the Migratory Bird Treaty Act. This is consistent with the spirit of fair chase, as well as to facilitate the maintenance of the waterfowl populations and other migratory birds.

However, we are concerned that at the present time a hunter can actually be arrested and fined when he has no knowledge that the area has been baited. With this in mind, we understand and support the fine tuning of the baiting regulations to ensure fairness to hunters while protecting the migratory bird resource from being hunted over bait. This seems very reasonable.

While a change does seem appropriate for protecting innocent hunters, we do have a larger concern, and that concern is that this

could create a loophole thereby facilitating unethical hunters—or I would prefer to call them poachers—attracting waterfowl by baiting and then getting away with it. This is inappropriate.

Another concern we have is that, as the U.S. Fish and Wildlife Service testified today and a year ago before the House, they do not know what the impact this change will have on the migratory bird resource. The bottom line interest of the National Wildlife Federation with respect to conservation of migratory birds, is a very great concern to us.

Because of these concerns, the National Wildlife Federation does oppose H.R. 2863 on the grounds that the changes of the migratory bird regulations are most appropriately established at the regulatory level. These are complex regulations that require professional judgment and assessment of changing conditions in the field, especially with respect to the populations of migratory birds.

To take the broad brush approach of a legislative action would prevent the Fish and Wildlife Service from fine-tuning regulations.

The second reason the National Wildlife Federation opposes H.R. 2863 is that the Service is currently engaged in a public review process to assess the appropriateness of these regulations. While certainly the Fish and Wildlife Service has not proposed to change them, the comment period is still open until October 1—I understand there are a number of comments that have come in—and we would like to see that process through to completion.

To stop that process now would render all those public comments moot and interrupt the public review process mid-stream.

In summary then, the National Wildlife Federation urges the Fish and Wildlife Service to take regulatory and policy changes into consideration and that the Congress not take legislative action at this time.

Thank you for the opportunity to testify.

Senator CHAFEE. Thank you very much.

Now, Ms. Metaksa, if you would proceed please?

**STATEMENT OF TANYA K. METAKSA, EXECUTIVE DIRECTOR,  
NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLA-  
TIVE ACTION, FAIRFAX, VIRGINIA**

Ms. METAKSA. I have given the committee a complete statement, and I ask that it be put into the record. I am going to summarize it for you, sir.

Senator CHAFEE. All right, that's fine. We'll do that.

Ms. METAKSA. Thank you.

On behalf of the National Rifle Association, Mr. Chairman, I appreciate the opportunity to testify in strong support of H.R. 2863, the Migratory Bird Treaty Reform Act. It is a core NRA belief that hunters are called to be faithful stewards of America's wildlife bounty, and these are not just words but promises of action.

Part of this stewardship, this action, took place over 80 years ago when hunters clamored for passage of the Migratory Bird Treaty Act of 1918. At that time wildlife was being eradicated. Mercenaries for both market and millinery all but consumed entire populations of white-tailed deer, bison and waterfowl and other species. In fact, back in the 1870's as many as 15,000 canvasbacks were taken each day by market mercenaries right here on the Chesa-

peake Bay alone—15,000 a day. So the American hunter that made conservation history in this era brought to life many progressive laws, notably the Migratory Bird Treaty Act of 1918, a visionary wildlife conservation law. In the past 80 years just one aspect stands out in perpetual controversy—the prohibition of hunting over bait, or with the aid of bait.

The words themselves do not embody a strict liability standard of guilt, but most courts have treated violations of the baiting prohibition as a strict liability criminal offense. Strict liability, as we have heard, prevents hunters from presenting convincing evidence that they did not know, or reasonably could not have known, that bait was present.

While the U.S. Fish and Wildlife Service keeps telling American hunters, “seek relief, not through legislative action but through rulemaking,” let’s just take a look at how cooperative of a partner the Fish and Wildlife Service has been in the rulemaking process:

In 1990 the U.S. Fish and Wildlife Service established a law enforcement advisory commission to look at an array of issues. One of the commission’s recommendations 8 years ago was to create a task force to review the baiting regulations—action taken, none. The task force was never created.

A year later the Fish and Wildlife Service published a notice of intent in the Federal Register to review the baiting regulations, and the NRA agreed. Heed your own advisory commission; create the task force you called for the year before—never happened. Replace the strict liability interpretations and regulations with clear regulatory language, language that reflects a standard of reasonable diligence.

That standard is reflected in the bills that you are talking about today. The response from the Service? There wasn’t any. Two years later in 1993 the Service published a supplemental notice of review making no mention of the strict liability issue, and then nothing was heard for another 3 years when it published another notice on another aspect of the baiting regulations. The NRA asked to please broaden the scope, include the strict liability issue, and this past Spring, prompted by Congressional action on earlier versions of H.R. 2863, the Fish and Wildlife Service proposed a rule to amend the baiting regulations.

However, I would like to bring to the committee’s attention that the Fish and Wildlife Service excluded from public review and comment the very crux of this hearing, the baiting issue from the perspective of the American hunter, adoption of the “know or reasonably should know” standard, termed the *Delahoussaye* standard, now embodied in this bill.

Critics, we have heard, claim that requiring law enforcement to prove intent to break the law will make cases impossible to prosecute. To the contrary, law enforcement would only need to prove that persons knew, or reasonably should have known, that there was hunting over bait. Even without intent the person could still be found guilty if the court determined that due diligence was not applied in examining the hunting area for the presence of bait. Hunters have been prosecuted in cases where they could not reasonably have known that a field was baited, and in some cases the bait was half a mile from where they were hunting.



This was the very reason why in 1978 the Fifth Circuit Court of Appeals ruled in favor of the hunter in the *United States vs. Delahoussaye*.

The three States that comprise the Fifth Circuit—Louisiana, Mississippi and Texas—have experienced no hardship in prosecuting baiting cases. They boast a conviction rate of 88 percent. Frankly, we believe the Fish and Wildlife Service has had 20 years to challenge the *Delahoussaye* standard if it believed the standard was having a detrimental impact upon law enforcement—there has been no challenge. Moreover, the Service's own witness at a Congressional oversight hearing in May 1996 in response to a query said that the *Delahoussaye* standard, "could be acceptable as the standard for criminal liability."

One of the great contributions American hunters make to the larger American culture is the outdoor ethic. Consider the meaning of these important words from "A Sand County Almanac," by Aldo Leopold, a great American hunter: "The hunter has no gallery to applaud or disapprove of his conduct. Whatever his acts they are dictated by his own conscience. It is difficult to exaggerate the importance of this fact. Volunteer adherence to an ethical code elevates the self-respect of the sportsman."

The House resolution we support here is a tribute to the hunters and conservationists who created the Migratory Bird Treaty Act of 1918. We believe you should take it up. There can be no passion to hunt without the passion to conserve, and that sentiment springs from what the NRA seeks to protect—the heart and soul of the American hunter.

Thank you very much, Mr. Chairman.

Senator CHAFEE. Well, thank you very much.

Now, Ms. Hood, Director of Science for Defenders of Wildlife.

Ms. Hood?

**STATEMENT OF LAURA C. HOOD, DIRECTOR, SCIENCE  
DEPARTMENT, DEFENDERS OF WILDLIFE**

Ms. HOOD. Thank you, Mr. Chairman, for having this opportunity to testify before the committee today on H.R. 2863, enforcement against hunting by using bait, as prohibited by the Migratory Bird Treaty Act.

My name is Laura Hood, and as Director of the Science Department at Defenders of Wildlife, I will address the potentially troubling consequences of this bill for migratory bird populations.

Defenders is a conservation advocacy group with over 250,000 members and supporters. Defenders is not an anti-hunting organization. It is an organization that is committed to the science-based protection and management of natural resources across the country, especially migratory birds.

Today, I will make three key points for your careful consideration of this important bill:

First, changing the strict liability standard to the scienter standard will curtail enforcement against baiting, providing a huge loophole for hunters who use this unethical practice.

Second, this change poses additional risks for bird populations, and any change to the Migratory Bird Treaty Act, especially this one, must include a careful analysis of potential impacts.

Third, now is not the time to make a potentially far-reaching change to the Migratory Bird Treaty Act, and I think that others here have testified to that point.

Other groups that oppose H.R. 2863 include the American Bird Conservancy, the Izaak Walton League, the National Audubon Society and the Humane Society of the United States. The Fish and Wildlife Service opposes this bill, the Secretary of Maryland's Department of Natural Resources opposes this bill, and, very significantly, the Federal Wildlife Officers Association opposes this legislation.

The Federal Wildlife Officers are concerned that this legislative change would cripple enforcement against hunters who use bait. For over 60 years courts have interpreted the MBTA as imposing strict liability because otherwise it would often be impossible for an enforcement agent to prove that a hunter was aware of the bait.

Let's take a look at who agrees with this view—Federal Wildlife Officers Association agrees with this view, Maryland's DNR Police Superintendent agrees with this view, Federal Appeals Court Judges agree with this view. U.S. Magistrate Judge Frederic Smalkin from Maryland stated to Congress in 1984, "In addition to being a shield for the innocent, such a requirement could be a windfall for the guilty. In view of the difficulty of proving scienter beyond a reasonable doubt, it would appear to me from my practical perspective that the requirement of proving scienter would effectively curtail enforcement of the prohibition of baiting."

I note that, moreover, hunters who use bait are more likely to exceed bag limits, which will also exacerbate the problem for migratory bird populations.

Another concern is that if the scienter requirement becomes law, it opens the door to an additional major blow to the Migratory Bird Treaty Act. Judges could rule in the future that the new scienter requirement extends to other violations of the MBTA, including killing birds in oil spills, power line strikes, pesticide poisonings, building construction and other ubiquitous threats to birds.

For example, Mr. Chairman, the terrible oil spill that occurred along the coast of Rhode Island in 1996 resulted in hundreds of deaths of migratory birds. The ship manufacturers were fined \$3 million under the MBTA, and the strict liability standard was essential for enforcement of the Act in that case. In an unintended nightmare scenario, enforcement against such preventable bird die-offs will be undermined by this legislation, and these die-offs will increase.

My point in raising these concerns is to urge caution in changing the MBTA. I do not believe that changing the Act as legislatively is a cautious approach. Now is particularly not a good time to make a legislative change because the Fish and Wildlife Service is currently engaged in rulemaking on this issue.

Despite decades of debate on this issue, we still do not have comprehensive studies on likely impacts of the scienter requirements on the prevalence of baiting or on migratory bird populations, and bird populations face numerous threats that are not likely to lessen in the coming years. Habitat destruction is widespread, human population pressure is increasing and poisonings and pollution pose major threats to birds.

Given all of these factors, we seem ill-prepared to take another risk with regard to this precious public resource.

Thank you.

Senator CHAFEE. Thank you very much.

And, now, Mr. Manning.

**STATEMENT OF BRENT MANNING, DIRECTOR, ILLINOIS DEPARTMENT OF NATURAL RESOURCES, INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES; ACCOMPANIED BY PAUL LENZINI, LEGAL COUNSEL**

Mr. MANNING. Good afternoon, Mr. Chairman.

I am Brent Manning, Director of the Illinois Department of Natural Resources, chairman of the Association of Fish and Wildlife Agencies Ad Hoc Committee on Baiting, Former Director of Field Operations for Ducks Unlimited and member of the International Executive Committees. I would like to thank you for the invitation to testify today on behalf of the Association.

The Association, as you are probably aware, has been a strong and consistent supporter of migratory bird conservation for more than 95 years. No organization has been more dedicated to the protection and sustainable use of migratory bird resource than International and its members States.

As you are aware, State Fish and Wildlife Agencies have statutory authority to ensure the conservation of fish and wildlife resources within their borders. In fact, through cooperative agreement with the Fish and Wildlife Service, most State conservation officers enforce both State and Federal conservation wildlife laws and regulations.

We support, and strongly support, changing the standard for baiting violations from strict liability to one of "knows or reasonably should know," as reflected in H.R. 2863. We also strongly support the proposed imposition of liability on those who place or assist in the placement of baiting so as to create a, quote-unquote, "baited area."

For the past 2 years our ad hoc committee on baiting has undertaken an exhaustive review of the migratory bird hunting regulations that pertain to baiting. Waterfowl biologists, wetland managers, wildlife enthusiasts, agency directors, law enforcement officers and hunters provided us with input and advice. We recently submitted our recommendations to the Service in response to a proposed rule change.

The one issue that the Fish and Wildlife Service has declined to address in its proposed rule is that of strict liability, which is the subject, of course, of H.R. 2863. We support the replacement of the strict liability standard with the standard adopted in 1978 by the U.S. Court of Appeals for the Fifth Circuit, commonly referred to as the *Delahoussaye* decision.

Under the strict liability standard individuals unknowingly hunting waterfowl or doves a mile from bait, and without any knowledge of the presence of that bait, have been cited. We consider this unreasonable, unnecessary and totally unacceptable.

The Sixth Circuit in 1984 characterized the standard in the following way, and I quote: "We concede that it is a harsh rule and

trust that prosecution will take place in the exercise of sound discretion only,” end quote.

Furthermore, in the 1978 *Delahoussaye* case the Fifth Circuit Court rejected the strict liability interpretation. Instead, the Court required, at a minimum, that the presence of bait could reasonably have been ascertained by the conscientious hunter. The Court went on to say, “any other interpretation would simply render criminal conviction and unavoidable occasional consequence of duck hunting and deny the support to those, such as, say, judges, who might find such a consequence unacceptable,” end quote.

The Fifth Circuit Court does not follow the strict liability standard to this day. This bill does not mean that hunters will have a free pass to hunt over a baited field. Quite the contrary, hunters would be responsible for taking reasonable efforts to ensure they are not attempting to take migratory game birds by the aid of bait or baiting. Hunters should ask the guide, manager or land owner about the presence of bait, inspect the hunting area and assess the behavior of the hunted birds. Under the proposed standard of liability, the hunter will be judged not just on whether he or she knew the area was baited, but also whether he or she should have known the area was baited.

This bill would require an officer to prove the hunter’s intent, nor will this bill require the knowledge on the hunter’s part. It merely requires that the hunter should reasonably have known that the area was baited. This bill will not allow a hunter to avoid citation by claiming not to have known about the presence of bait. At issue here is whether the hunter should have known, either by an inspection of the area or by the behavior of the birds. The issue is not whether the hunter did or did not in fact know.

Regarding conviction rates, we are not aware of any significant difference in rates of conviction or pleas of guilty between States currently under the *Delahoussaye* standard and those that are not. In fact, Fish and Wildlife Agents are on record stating that migratory bird baiting cases have dropped precipitously in Louisiana during the last decade. The agents attribute that decline in part to tougher penalties handed down by Federal judges and magistrates, and I would like to remind the committee that this crackdown on illegal baiting and other activities took place under the “knew or should have known” *Delahoussaye* standard of liability, as proposed by this bill.

It has also been alleged that any standard other than strict liability will measurably and seriously harm the migratory bird resource. There is no scientific credibility to that basis of concern. The Fish and Wildlife Service’s current approach to regulating the impact to harvest on ducks takes into account variations in harvest rates caused by fluctuations in hunting pressure, habitat, bird population, season links and bag limit. This system makes annual adjustments for these factors. No waterfowl experts with whom we’ve consulted, including the best and most renowned in the nation, believes the adoption of the *Delahoussaye* standard will result in a measurable increase in harvest, but even if it did—and, again, there is no evidence that it will—the system would compensate by prescribing shorter seasons and/or reduce bag limits, or both.

Opponents of this bill have claimed that the proposed minimum form of scienter would apply to all other takings of migratory game birds. Examples such as mining companies, or cyanide leech, a farmer using harmful pesticides and refining spilling oil have been offered. This bill eliminates the strict form of liability in baiting cases and replaces it with a minimum scienter in such cases, not in all other forms of takings.

In conclusion, I wish to point out that the Service specifically addresses the strict liability standard in its current rulemaking proposal by stating, and I quote, "application of the standard to baiting regulations is of concern to many hunters," end quote. Nevertheless, the Service proposes no change in the application to hunters of the strict liability standard.

I referred earlier to the Katlit decision where the U.S. Court of Appeals for the Sixth Circuit characterized strict liability in the present context as a harsh rule. The Court went on to say, and I quote, "it is for Congress and the Secretary of the Interior to establish and change the policy here involved," end quote.

Because the Fish and Wildlife Service declined to take a hard look at the application of strict liability hunters invading cases, Congress should do so.

I would like to thank you for the opportunity to share our perspectives with you. I do represent those States involved in the International Association of Fish and Wildlife Agencies, and I would be pleased to address any questions. I would like to make one final point, and that is I would like to emphasize that it is the opinion of the committee, the ad hoc committee on baiting and the Legal Counsel of the International, that strict liability cannot be addressed through the Service's current rulemaking process. Also, the Service has told us and suggested on a number of occasions that strict liability cannot be addressed by this rulemaking process, as well.

Thank you very much, sir, for your time.

Senator CHAFEE. I don't quite understand your last point. You say that the Fish and Wildlife Service says that the strict liability cannot be addressed by regulation?

Mr. MANNING. That is correct, that it cannot be addressed by the rulemaking process that they are current undergoing, and that's been reported to me by, actually, Mr. Davis, who testified earlier.

Senator CHAFEE. Why is that so?

Mr. MANNING. If I could, may I ask Mr. Lenzini to respond?

Mr. LENZINI. Mr. Chairman, my name is Paul Lenzini, and I am Legal Counsel to the International Association.

The proposed rulemaking of the Service states that it does not intend to change the strict liability standard. If they were on the basis of this proposed rulemaking to do so, it would be a violation of the notice and comment provisions of the APA. They could address it in a new rulemaking but not in this particular rulemaking, we think.

Senator CHAFEE. Well, you lost me on that one. Why not?

Mr. LENZINI. Because when the U.S. Court of Appeals for the D.C. Circuit just a couple of years ago in an Opinion by Judge Starr held that once a clear signal is sent, that a proposal of an agency does not intend to make a certain change, it cannot on the

basis of that proposed rulemaking make the change because people would have been invited to believe that no change was in the offing.

In this particular case, the agency has very clearly stated, sent a very clear signal, that it does not intend to change strict liability.

Now, in the future, on another rulemaking, it could certainly do that, but on this outstanding rulemaking, we believe, it could not do so without violating the notice and comment provisions of the APA. I would be glad to supply more information——

Senator CHAFEE. What would be the point of going through all this effort if——

Mr. LENZINI. The point would be the notice and comment provisions of the APA, which require that an agency explain what it has in mind so that people can comment.

Now, if the agency says, "We do not intend to change something," then people will not be led to comment one way or the other. There is authority in the Circuit, Senator Chafee, for that proposition. I would glad to supply it.

Senator CHAFEE. Well, they could—if they went through another round of notice, they could, if they wanted to.

Mr. LENZINI. Absolutely.

Senator CHAFEE. All right.

Now, Mr. Inkley, in your testimony you said that you're not necessarily against what is proposed in this legislation. Nonetheless, you are opposed to it because you don't want to take this process.

Is that a fair comment about what you said?

Mr. INKLEY. We have indicated that we believe that some changes need to be made to this standard of strict liability, but that it should be done at the administrative level rather than the legislative level. Our concern is that this is a process of regulations that has to be very finely tuned, and we are a bit concerned that if you take a legislative action, it will be very difficult for the Service to make appropriate adjustments based on their experience of enforcing the changes.

Senator CHAFEE. Ms. Hood, you indicated—I suppose we could say that you are suggesting we're starting down a slippery slope here if we should approve this, and you thought the courts might indicate, such as the Rhode Island oil spill that took place in 1996, they might not—and there they did hold them strictly liable—and your suggestion that perhaps if we did this legislation, the strict liability standard might not be there.

I'm not sure I follow your reasoning on that. If we should go to the trouble of saying such and such is not strict liability, then it seems to me that the balance of the offenses would be strict liability. In other words, if you haven't specifically gone out and changed—we're indicating here that you have to have a statute to change what is a strict liability situation now, and by not dealing with the oil spill from 1996, we would in effect be saying strict liability does apply.

Do you follow that?

Ms. HOOD. Yes, I think that's a good point. I think that, with the caveat that I'm not an attorney or a judge, to my knowledge if the legislation were adopted, the MBTA would be the only law that would have a scienter requirement for petty offenses. For small of-

fenses, like for baiting, we would have a scienter requirement. You could see where judges might reason that it's in the MBTA that scienter is required for these small violations of baiting, and that it could be applied to other violations of the MBTA.

My point in bringing this up is that we're opening up a Pandora's box here by changing it legislatively, that by promulgating Congressional intent to have the scienter requirement we could be going down a slippery slope. I really hope that that would not happen, but I do think it is potentially a Pandora's box, especially combined with some of the other effects that the legislation might have as well on baiting.

Senator CHAFEE. What would you say, Mr. Inkley, or, Ms. Hood, if we had a sunset provision in here? In other words, try it. Mr. Manning has indicated—I think I'm quoting you properly from your testimony—that there is no suggestion that in the Fifth Circuit area where there is not strict liability that the bag—that the take is greatly increased, but maybe it's a risky business and one thought might be that we would have it for 5 years, whatever it might be, and then it would sunset and Congress could then reenact it, if it so chose, or not.

What would you say to that?

Mr. INKLEY. I would be happy to address that, Mr. Chairman. We think that the sunset proposal that you've suggested would be ideal for the administrative process, not for the legislative process. The administrative process is specifically designed to allow the regulatory agency to have the flexibility to address the regulations as they see appropriate. That is another reason that we would support that this be done at the administrative level.

By putting in a sunset provision, it enables the Fish and Wildlife Service to study the potential impacts, both on hunters and on the migratory bird resource and make adjustments, as necessary.

Senator CHAFEE. But Ms. Metaksa has pointed out how long this has all taken, and I know you're here in the best of spirits but how do we know how Senator Breaux and others who are deeply concerned about it, how do they know anything is going to happen? It has taken forever for you folks to get as far as you have, and, you know, say something happens on October 1st—I guess that's the deadline—but then you have to sift through all that information, and this might go on for another 7 years.

Mr. INKLEY. Well, I would certainly hope that it wouldn't go on for another 60 or 70 years, but I think there is an administrative process underway. There is public comment, and many people have responded to that. I think it would be wrong for us to simply throw all that out, simply ignore it, and then proceed with legislative action at this time. I think we should see the administrative process through to completion, allow the Fish and Wildlife Service to take into consideration all the comments that they have received, and, perhaps, and hopefully they would come forward with a proposal to make the changes at the administrative level.

Senator CHAFEE. You may have misunderstood me—I didn't say 60 or 70 years—7 years is what I said. Maybe you said 70—anyway, I said 7.

Well, what did you say, Ms. Metaksa. Am I pronouncing that right?

Ms. METAKSA. Yes, sir, you did a good job.

Senator CHAFEE. Finally. What do you say to the sunset provision?

Ms. METAKSA. I think that sunset provisions can be very useful. I would like to see it resolved legislatively because I, like a lot of people in the Congress, have become frustrated waiting for a regulatory solution to this. I agree with Mr. Manning that the current proposals do not address the baiting issue so we would have to go through another round of possible proposals, and the record of the Fish and Wildlife Service is pretty poor in addressing this issue. They seem to ignore it every time they're told to take a look at it.

So I have no problem with sunset provisions—it gives you a chance to take a look at it—if that is the way that Congress would like to go. I just think we need to get it done soon.

Senator CHAFEE. Okay, well, thank you all very much for coming.

You've got a point?

Mr. MANNING. Yes, Senator, I would like to make one final point, if you would allow me?

Senator CHAFEE. Sure, go ahead.

Mr. MANNING. In looking at the package that the Fish and Wildlife Service is reviewing, that package takes into consideration much biology of vegetative manipulation, etcetera, etcetera. Strict liability was one component, which was left out of the package, therefore, the need for some level of codification through the legal process that we have before us.

Senator CHAFEE. All right, thank you.

Does anybody else have a comment?

[No response.]

Senator CHAFEE. Okay, well, thank you all very much for coming. We appreciate it and sorry there were the delays there.

[Whereupon, at 12:15 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Text of H.R. 2863 and additional statements submitted for the record follow:]



105TH CONGRESS  
2D SESSION

# H. R. 2863

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 1998

Received; read twice and referred to the Committee on Environment and  
Public Works

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## AN ACT

To amend the Migratory Bird Treaty Act to clarify restrictions under that Act on baiting, to facilitate acquisition of migratory bird habitat, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Migratory Bird Treaty  
3 Reform Act of 1998”.

4 **SEC. 2. ELIMINATING STRICT LIABILITY FOR BAITING.**

5 Section 3 of the Migratory Bird Treaty Act (16  
6 U.S.C. 704) is amended—

7 (1) by inserting “(a)” after “SEC. 3.”; and

8 (2) by adding at the end the following:

9 “(b) It shall be unlawful for any person to—

10 “(1) take any migratory game bird by the aid  
11 of baiting, or on or over any baited area, if the per-  
12 son knows or reasonably should know that the area  
13 is a baited area; or

14 “(2) place or direct the placement of bait on or  
15 adjacent to an area for the purpose of causing, in-  
16 ducing, or allowing any person to take or attempt to  
17 take any migratory game bird by the aid of baiting  
18 on or over the baited area.”.

Passed the House of Representatives September 10,  
1998.

Attest: ROBIN H. CARLE,  
*Clerk.*

## STATEMENT OF HON. TRENT LOTT, U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Mr. Chairman, I want to thank you for the opportunity to show my support for legislation seeking to amend the Migratory Bird Treaty Act. I appreciate the committee's willingness hold hearings and mark up this bill, which was overwhelmingly passed by the House of Representatives this summer.

Mr. Chairman, Members of the Environment and Public Works Committee, for the past 80 years there has been relatively little controversy over the U.S. Fish and Wildlife regulations governing migratory birds. In fact, the enforcement of these regulations has had a beneficial impact on their populations. One regulation, however, has sparked tremendous debate and has been inconsistently enforced across the United States.

This regulation states that if an individual is hunting over a baited field—whether he knows it or not—he is guilty. There is no defense and there is no opportunity to present evidence in a case. If there is bait, the hunter is guilty. Automatically guilty. It does not matter how much bait was present—a handful or a field-full. It does not matter if the bait actually attracted the birds or not. It does not matter how far the bait is from the hunting venue. If the bait and the hunter are there simultaneously, the hunter is guilty. Case closed.

I have been a hunter for many, many years, and I agree that baiting a field is an unacceptable action. However, I maintain that continuing to apply this strict liability legal standard to baiting cases is wrong and unfair. In fact, I believe that it violates one of our most precious and fundamental constitutional protections—that a person is innocent until proven guilty.

Mr. Chairman, this strict liability standard is unreasonable. During this hearing, I hope that the committee hears from those who have been unfairly trapped by this unbending regulation. I also hope that you will also hear from those who have stopped hunting migratory game birds because they do not want to run the risk of being convicted of a Federal crime.

Mr. Chairman, I support legislation to change this regulation, especially legislation that amends the standard to state that a hunter is guilty if he "knows or reasonably should have known" that he was hunting on a baited field. My colleagues, Senators Cochran and Breaux have shown tremendous leadership in introducing a bill that would fix this problem. I commend their efforts and congratulate them on tackling this issue head-on.

I would also like to recognize and thank Rep. Don Young, chairman of the House Resources Committee and avid hunter, for his dedication to this issue. Not only is Chairman Young a renowned hunter, he is an able legislator. I hope that we can push Migratory Bird Act Reform across the Senate finish line, completing the good work he has already begun in the House.

Before I close, Mr. Chairman, I want to draw the committee's attention to one other issue involving baiting. In Mississippi, we do not have a problem with strict liability. Our problem revolves around the top-sowing of wheat for dove hunting and moist soil management for duck hunting. I hope that the committee, as well as my fellow Southeasterners, Mr. Cochran and Mr. Breaux, will remain committed to addressing these issues for the benefit of hunters in our states.

On that note, Mr. Chairman, I want to again thank you and the committee for dedicating time to this issue and for marking up and reporting out this bill as soon as possible. Let's finish the good work started by the House. Let's take the unbending stringency out of these baiting regulations. Thank you.

## STATEMENT OF KEVIN ADAMS, CHIEF, OFFICE OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to discuss the Administration's position on H.R. 2863, the Migratory Bird Treaty Reform Act of 1998, as passed by the U.S. House of Representatives. As passed, this bill would eliminate the current "strict liability" standard used in enforcing waterfowl baiting regulations and make it illegal for any person to place or direct the placement of bait on or adjacent to an area being hunted.

The Department of the Interior shares your concern for the need to clarify and simplify the migratory game bird hunting regulations regarding baiting. On March 25, 1998, the U.S. Fish and Wildlife Service published in the Federal Register for public review and comment a proposed rule concerning hunting migratory birds by baiting or using baited areas. This rulemaking process was initiated after extensive review of the current regulations and in response to public concerns about interpretation and clarity of those regulations, especially with respect to current migratory

bird habitat conservation practices. The Administration believes that H.R. 2863 will disrupt the Agency's ongoing decisionmaking process and is opposed to the bill.

The Migratory Bird Treaty Act, which implements international treaties with four of our neighboring countries for protection and conservation of migratory birds, authorizes the Secretary of the Interior to determine by regulation "... when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting. . . ."

Federal baiting regulations were established in 1935 when waterfowl populations suffered from drought, degradation of habitat, and over-harvest by hunting. The two hunting practices primarily responsible for over-harvest were the use of bait and live decoys, both of which quite effectively lure birds to waiting guns. Of all the factors affecting migratory bird populations, these two can be controlled or curtailed by enforcement actions.

Enforcement of the baiting regulations include a "strict liability" doctrine. Under strict liability, the government does not need to prove that the hunter knew he or she was violating the law. H.R. 2863, as passed by the House, would eliminate the "strict liability" standard and replace it with the "know or reasonably should have known" standard. This new standard will require Service law enforcement officers to prove that a person knows or reasonably should have known that the area in which he or she was hunting migratory birds was baited before it can establish that a violation occurred. This bill will also include this language in the Migratory Bird Treaty Act, rather than in the Code of Federal Regulations, where the current prohibitions are found.

This concludes my statement. I would be glad to answer questions.

#### RESPONSES BY KEVIN ADAMS TO ADDITIONAL QUESTIONS FROM SENATOR GRAHAM

*Question 1(a):* Under current law, what type of discretion can your agent's use in enforcing baiting regulations?

Response: Our agents are often required to exercise discretion in the course of their duties, including during enforcement of the baiting regulations. Decisions to issue a Notice of Violation or refer a case for prosecution are based on circumstances unique to each situation. These circumstances may include efforts made by a hunter to comply, a hunter's level of experience, an agent's prior intelligence about the area, including human and bird activities, the actual situation of the bait, and local rules of the courts. Options range from issuing a verbal or written warning, charging a single hunter, charging multiple hunters, or charging an individual who claims responsibility.

*Question 1(b):* Do you provide any written guidance to your agents to limit or guide the extent to which individual agents can use discretion in enforcing your regulations?

Response: Yes. Both training and guidance assist individual agents in determining the extent to which they may use discretion. The guidance received by agents includes 40 hours of mandatory Special Agent In-Service training each year. Guidance is also provided at both the Regional and Washington Office levels in the form of Law Enforcement Memorandums that contain policy statements on specific migratory bird hunting issues.

*Question 2:* There has been discussion that modification of existing migratory bird law with the "known or should have known" standard that we are addressing today could be the first step down a road where "intent" must be proven before enforcement of any migratory bird take or almost any environmental regulation. Do you believe these statements are valid?

Response: Yes. The current proposal will include the knows or should have known standard only in the baiting provisions of the Migratory Bird Treaty Act. The Service is concerned that such a change to the MBTA would lead to other changes in the MBTA, lessening the protection currently afforded to migratory birds. The effects of hunter impact on the take of migratory game birds (waterfowl, doves, etc.) do not compare to the significant numbers of migratory game and non-game birds (including raptors, songbirds, eagles) routinely killed by oil spills, pesticides, electrocution, contamination, aquaculture operations, or habitat development, which also requires a strict liability standard for enforcement. In fact, as a result of awareness of strict liability, organizations have taken actions to prevent mortality. These actions include changing the manufacture and use of pesticides that are toxic and deadly to migratory birds; developing measures that prevent electrocution from power line strikes and contamination at petroleum pits, open oil pits, and cyanide leach operations; and avoiding impact to birds during habitat development. The Service is concerned that the courts may look at changes to the baiting section of

the statute and may lead the business, industrial, and agricultural communities to seek similar changes.

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RESPONSES BY KEVIN ADAMS TO ADDITIONAL QUESTIONS FROM SENATOR  
LAUTENBERG

*Question 1:* What is it about baiting that is so objectionable that we should keep the strict liability standard in prohibiting it?

Response: The baiting regulations support the spirit of fair chase. Hunters who exhibit and practice the spirit of fair chase in pursuit of wild game are required to be knowledgeable of the game they are in pursuit of. Baiting provides unnatural concentrations of birds, resulting in much greater opportunities for hunting success than would otherwise be the case. Our seasons and bag limits are predicated upon standard hunter success rates. Baiting gives those who engage in it an artificial advantage over those who do not.

Baiting of migratory birds by unethical hunters has become so sophisticated that it has become difficult, if not impossible for of ricers to substantiate a violation. Agents must utilize the full range of criminal law enforcement techniques to obtain evidence of bait, including expensive and time-consuming round-the-clock surveillance and undercover techniques, to meet one of many statutory responsibilities. In many instances, there are simply an insufficient number of law enforcement agents, even in cooperation with state fish and wildlife law enforcement officers, to effectively substantiate knowledge of baiting by the hunter, reducing the standard for violations could well increase the number of hunters who engage in the practice.

*Question 2:* Besides baiting, what other activities are misdemeanors under the Migratory Bird Treaty Act under a strict liability standard?

Response: All Migratory Bird Treaty Act offenses are covered by strict liability and are misdemeanors except for situations in which the individual (or business) knowingly takes with the intent to sell, offer to sell, or barter, in which case the violation is a felony.

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STATEMENT OF DOUGLAS B. INKLEY, SENIOR SCIENTIST AND SPECIAL ASSISTANT TO  
THE PRESIDENT, NATIONAL WILDLIFE FEDERATION

We appreciate this opportunity to testify before the Senate Committee on Environment and Public Works regarding H.R. 2863, the Migratory Bird Treaty Reform Act. The National Wildlife Federation (NWF) is the nation's largest conservation education organization. Founded in 1936, NWF works to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the Earth's environment in order to achieve a peaceful, equitable, and sustainable future.

This nation is fortunate to have a rich avian diversity of over 600 native species, ranging from hummingbirds and warblers, to ducks and geese, to our national symbol, the magnificent bald eagle. Birds have been and continue to be a tremendous historic, aesthetic, recreational and economic resource to the United States and its citizens. Of particular relevance to today's hearing are waterfowl and waterfowl hunting. In 1996, over three million people hunted for migratory birds according to the National Survey of Fishing, Hunting, and Wildlife-Associated Recreation conducted by the U.S. Fish and Wildlife Service (Service).

The conservation of this nation's waterfowl resource has long been of interest to NWF. We worked with the Service to prohibit the use of toxic shot in waterfowl hunting because of the mortality caused to birds, especially waterfowl and birds of prey, by the ingestion of spent lead shot. NWF supports the North American Waterfowl Management Plan and worked hard to assist Congress in passing the North American Wetlands Conservation Act. Furthermore, in the interest of conserving waterfowl habitat, among other purposes, we support strengthening the Clean Water Act and the Section 404 wetlands regulatory program. Finally, on behalf of NWF, I am a member of the International Association of Fish and Wildlife Agencies' Ad Hoc Committee on Baiting, which has addressed this issue.

NWF is here today not only because of our interest in conserving the migratory bird resource, but also because of our long-standing support for properly regulated utilization of wildlife. Our nation's migratory bird resource must be properly managed and protected to provide a continuing rich and diverse avian heritage for future generations. H.R. 2863, the Migratory Bird Treaty Reform Act, passed by the U.S. House of Representatives on September 10, 1998 and the subject of today's

hearing, concerns the regulations for hunting of migratory birds, particularly with respect to baiting of waterfowl.

The placement of bait to facilitate taking of waterfowl has long been illegal under the Migratory Bird Treaty Act. This has long been accepted as consistent with the spirit of 'fair chase' as well as necessary to facilitate the maintenance of waterfowl populations. As waterfowl are particularly susceptible to baiting, NWF believes not only that baiting of waterfowl is unethical for hunting purposes, but should continue to be illegal as well. However, at present, a hunter who has no knowledge of a baited situation or that hunted birds are influenced by bait can be found in violation of the baiting regulations. With this in mind, we understand and support fine-tuning of the baiting regulations to ensure fairness to hunters while protecting the migratory bird resource from being hunted over bait. Instead of 'strict liability', H.R. 2863 would require that "the person knows or reasonably should know that the area is a baited area."

While the change seems appropriate for protecting innocent hunters, it is quite possible that the change could open a loophole in the law, thereby facilitating unethical hunters (poachers) in attracting waterfowl by baiting, and making it more difficult for law enforcement officers to successfully prosecute them. This in turn, could have a significant impact on the waterfowl resource. As the Service testified on this issue last year in the U.S. House of Representatives, they do not know what impact this will have on the waterfowl resource.

NWF opposes H.R. 2863 on the grounds that changes to migratory bird regulations are most appropriately established within the regulatory rather than legislative arena. These regulations require complex analysis and implementation, with special knowledge by trained professionals in wildlife conservation and law enforcement. Furthermore, the Service needs the flexibility, which is impossible to obtain in the legislative process, to make necessary regulatory adjustments as dictated by unpredictable and highly variable environments and conditions inherent to the management of the migratory bird resource. Managers must be able to adjust quickly in order not to compromise the control or management of legal harvest and the waterfowl resource itself.

Furthermore, the Service is currently engaged in a public review process and has solicited comments from the general public regarding the issues addressed in H.R. 2863. While the Service has proposed no change to the regulations, which has undoubtedly inspired Congress to take up this issue, the Service is still soliciting public comments (until October 1, 1998). Legislative action at this time would render moot, and in fact interrupt mid-stream, the public review process which is underway. Legislative action at this time is premature.

In summary, the NWF urges the U.S. Fish and Wildlife Service to make regulatory/policy changes to the migratory bird regulations pertaining to baiting, and that Congress not take legislative action.

Thank you again for this opportunity to testify.

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STATEMENT OF TANYA K. METAKSA, EXECUTIVE DIRECTOR, NATIONAL RIFLE ASSOCIATION, INSTITUTE FOR LEGISLATIVE ACTION

Mr. Chairman, on behalf of the National Rifle Association of America, I appreciate the opportunity to testify on H.R. 2863, the Migratory Bird Treaty Reform Act. This Act enjoys the wholehearted support of an Association that has safeguarded hunting and scientific wildlife management for more than a century.

With over 2 million hunter-members, NRA believes ardently that the conservation of our migratory bird resource is vital. It is a core NRA belief that hunters are called to be faithful stewards of America's wildlife bounty. Hunting is an American cultural heritage—one of our nation's most precious—but this noble pursuit requires us to commit ourselves to sustaining healthy, vibrant wildlife populations. In that spirit, the NRA embraces laws and regulations that safeguard both sport hunting and scientific wildlife management. That includes laws carrying criminal sanctions, and NRA has always supported fair, consistent and effective enforcement of those laws throughout our nation.

Eighty years ago, hunters clamored for passage of the Migratory Bird Treaty Act of 1918. Small wonder. At that time, wildlife was being eradicated, and sport hunters were in danger of losing not only their noble pursuit—but an even greater nobility—America's wildlife resources. The problem was not the American hunter. The American hunter numbered among the victims. The problem was the voracious appetite of the marketplace at the close of the 19th century. Mercenaries for both the marketplace and the milliners of the era all but consumed entire populations of white-tail deer, bison, waterfowl and other species. It has taken decades for Amer-

ican hunters and our allies in wildlife biology and game management to bring these species back, some from the brink of extinction.

While they migrated, when they wintered over, wherever they were seen, waterfowl were slaughtered. The most threatened species of the era are now the very populations hunters have worked so hard to nurture—snow geese, wood ducks, Canada geese. The marketplace mercenaries used devices like the “punt gun.” Weighing as much as 120 pounds with a bore of up to 2½ inches, it could bring down as many as 100 birds with a single shot. The NRA termed this “slaughter.” Clearly, it was not hunting. Worse yet were battery guns, crude boxes akin to organ pipe containments. From the boxes protruded a dozen or more punt gun barrels. In the 1870’s, as many as 15,000 canvasbacks were taken each day by market mercenaries on the Chesapeake Bay alone.

That was the backdrop for the 1918 Act. I urge this august body to consider who made conservation history in this dark era by breathing life into the 1918 Act. It was hunters—hunters motivated by the very core principle of the outdoor ethic—respect for wildlife.

Indeed, the heart of the American hunter was at the very center of a wave of legislation that swept America at the time. Hunters led this movement. Hunters organized their fellow hunter-conservators, mounting what we would term today as grassroots pressure on elected representatives to stop the strip mining of America’s sharply dwindling wildlife resources. But when Maryland established “rest days” to ease waterfowl hunting pressure in 1872, the marketplace mercenaries took no rest. When the hunters and naturalists of New England pressured legislatures there to list wood ducks as protected, the mercenaries either ignored the listing or simply moved their batteries elsewhere.

Because of their migratory nature, waterfowl could not be effectively conserved by one action in one state and a similar action in another. Federal regulation seemed the most appropriate course. Among the results—the Migratory Bird Treaty Act of 1918.

Eighty years have transpired since hunters bequeathed this nation a landmark, visionary wildlife conservation law. And in those 80 years, just one aspect of this sweeping regulation stands out as the center of perpetual controversy. CFR Part 20.21. A prohibition of hunting over, or with the aid of, bait.

While the words themselves do not embody a strict liability standard of guilt, most courts have treated violations of the baiting prohibition as a strict-liability criminal offense. The 1918 Act created a system to conserve wildlife and protect sport hunting. But today, the “system” the American hunter helped put in place does not care who placed the bait. Shouldn’t it? To that “system,” it doesn’t matter where the bait lies with respect to the hunter’s location. To that “system,” it doesn’t matter if the bait actually lures a single bird to the hunting site. All that matters is whether an officer testifies that, yes, bait was present. If so, the hunter is guilty.

Strict liability does not allow the hunter to present convincing evidence that he or she did not know or reasonably could not have known that bait was present. The great great grandchildren of the sportsmen and naturalists responsible for this 80-year-old Act are being deprived the opportunity to mount any defense—a condition their forebears would find absurd and unacceptable.

Over the years, we are thankful that Congress has held hearings on the need to reexamine the issue of strict liability. In 1990, the U.S. Fish and Wildlife Service established a Law Enforcement Advisory Commission to look at an array of enforcement issues within the Service’s jurisdiction. One of the Commission’s recommendations: create a task force to review the baiting regulations. Action taken? None. The task force was never created.

Critics of H.R. 2863 say reform of the 1918 law is unnecessary. They suggest that if American hunters have any problems with the baiting regulations, the rule-making process is the avenue to address those problems, not the legislative process. This has a very reasonable ring to it, but when it comes to the serious issue of strict liability, the ring is hollow indeed.

In 1991, the Fish and Wildlife Service published a notice of intent in the Federal Register to review the baiting regulations. In our comments, NRA encouraged the Service to act on its own Advisory Commission’s recommendation: namely, create the task force you called for in 1990. We also asked that the strict liability interpretation of the regulations be replaced with clear regulatory language that adopts a standard of reasonable diligence. (That reasonable standard is now reflected in H.R. 2863.) The response from the Service? There wasn’t any. Nothing was heard. Two years later, in 1993, the Service published a supplemental notice of review—but made no mention of the strict liability issue.

For 3 more years, the Service was silent on the issue—and remember, this is the only serious issue of dispute over the 1918 law for 8 decades. Yet, nothing was

heard from the Service until 1996, when it published another notice of intent on another aspect of the baiting regulations. The NRA recommended that the focus be broadened to include the strict liability issue.

This past Spring, prompted by Congressional action on earlier versions of H.R. 2863, the Fish and Wildlife Service proposed a rule to amend the baiting regulations. The Service, however, excluded from public review and comment the very crux of the baiting issue from the perspective of the American hunter: adoption of the "knows or reasonably should know" standard—termed the *Delahoussaye* standard—now embodied in H.R. 2863.

We must note that the decision to sidestep this important issue lies in stark contrast to the views expressed by the Service's own witness at a Congressional oversight hearing in May 1996. At that hearing, a Service witness, in response to query, responded that the *Delahoussaye* standard could be acceptable as the standard for criminal liability. Its unwillingness to follow-through and support adoption of the *Delahoussaye* standard can mean only one thing: the Fish and Wildlife Service is looking to you, the U.S. Congress, to resolve the issue. Tacitly, the Service is saying, while *Delahoussaye* is acceptable, we prefer it be codified through legislation, not rulemaking.

Those opposed to H.R. 2863 claim that requiring law enforcement to prove intent of the hunter to break the law would make baiting cases impossible to prosecute. We believe there is substantial evidence to the contrary. Under this bill, law enforcement would only need to prove that a person knew or reasonably should have known that he or she was hunting over bait. Even if a hunter could prove in court that he or she had no intent to hunt over bait, the hunter could still be found guilty if the court determined that due diligence was not applied in examining the hunting area for the presence of bait.

Hunters have been prosecuted in cases where they could not reasonably have known that a field was baited. In some cases, the quantity of bait was minute. In others, the bait was half a mile from where they were hunting. This was the very reason why, in 1978, the 5th Circuit Court of Appeals ruled in favor of the hunter in *United States v. Delahoussaye*, 572 F.2d 910 (5th Cir.1978). The court recognized that there are situations exceeding reasonable expectations of human responsibility. H.R. 2863 gives the American hunter the opportunity to defend himself or herself in court, a right afforded all other criminal defendants. American hunters should be treated as innocent until proven guilty—not be proven guilty irrespective of facts.

The hearing held last year in the House Resources Committee on the predecessor to H.R. 2863 provided ample evidence that the 3 states that comprise the 5th Circuit—Louisiana, Mississippi and Texas—have experienced no hardship in prosecuting baiting cases. A conviction rate of 88 percent belies dire warnings that this bill would undermine the resource. Frankly, the Fish and Wildlife Service has had 20 years to challenge the *Delahoussaye* ruling if it truly believed that the standard was having a detrimental impact upon law enforcement to perform its duty or upon the Service's ability to protect the resource.

H.R. 2863 does not remove the prohibitions against baiting. Rather, it ensures that such prohibitions are enforced fairly. As the court acknowledged in *Delahoussaye*, unless a hunter can be held to a reasonable standard of responsibility, criminal conviction can become an unavoidable consequence of duck hunting. Rules should be clear and understandable so that hunters, farmers, landowners and professional guides who intend to comply with the law can readily do so. Above all, this bill achieves that objective while preserving the lofty goals and objectives for migratory bird conservation our great great grandparents struggled to enact.

In summary, H.R. 2863 continues to prevent the use of bait in migratory bird hunting. It preserves the fundamental principle of "fair chase." It does not weaken any of the protections for our migratory bird resource. It prevents the irresponsible—the criminal—to escape prosecution. It provides a balanced solution to our country's statutory and treaty obligations to protect and conserve migratory birds while meeting our fundamental responsibility to protect the rights of our citizens to fair and equitable enforcement of laws.

H.R. 2863 lays on the shoulders of American hunters a fair and reasonable requirement to take responsibility for their actions afield. Hunters welcome this burden. Indeed, one of the great contributions American hunters make to the greater American culture is the outdoor ethic. In *A Sand County Almanac*, Aldo Leopold, a Great American hunter and naturalist, wrote,

"The hunter has no gallery to applaud or disapprove of his conduct. Whatever his acts, they are dictated by his own conscience. It is difficult to exaggerate the importance of this fact. Voluntary adherence to an ethical code elevates the self-respect of the sportsman. . . ."



H.R. 2863 is a tribute to the hunters and conservationists who created the Migratory Bird Treaty Act of 1918. When it becomes law, NRA is confident of our continued success in conserving America's wildlife resource, because that is a duty of every American hunter.

There can be no passion to hunt without the passion to conserve, and that sentiment springs from the heart of the American hunter.

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STATEMENT OF LAURA C. HOOD, DIRECTOR, SCIENCE DEPARTMENT, DEFENDERS OF WILDLIFE

Mr. Chairman, thank you for the opportunity to testify before your committee this morning regarding restrictions against hunting by using bait, as prohibited under the Migratory Bird Treaty Act of 1918. My name is Laura Hood and I am Director of the Science Department at Defenders of Wildlife (Defenders), a non-profit conservation advocacy group consisting of over 250,000 members and supporters. Defenders is headquartered in Washington DC, with field offices in Montana, Alaska, Oregon, Arizona, and New Mexico. Defenders' mission is to protect native wild animals and plants in their natural communities.

As an organization that is committed to science-based protection and sustainable management of migratory birds, Defenders of Wildlife opposes H.R. 2863. By changing the standard of proof for prosecuting hunters who use bait from strict liability to a "knew or should have known" (i.e., scienter) standard, H.R. 2863 would cripple enforcement of this important prohibition against baiting. In effect, this change would provide a huge loophole for hunters who use unethical baiting practices, overturn 62 years of case law, and negatively impact bird populations across the country. Most importantly, this legislative change requires careful scrutiny and expanded analysis of its potential impact on bird populations, not accelerated decision-making by Congress. Finally, legislative action is not necessary right now, because the U.S. Fish and Wildlife Service, working with a number of conservation groups and the public, is in the middle of rulemaking on this issue.

H.R. 2863 with its "knew or should have known" standard of proof is opposed by numerous conservation organizations, including the American Bird Conservancy, the Izaak Walton League, the National Audubon Society, and the Humane Society of the United States. Like Defenders, a number of those groups are not anti-hunting organizations. In addition, the Secretary of Maryland's Department of Natural Resources opposes the legislation, and has sent a letter on the matter to the entire Maryland Congressional Delegation. In my comments today I will emphasize three key points. First, changing the strict liability standard will curtail enforcement against baiting. Second, there is no immediate crisis to address through legislation, instead we must take enough time to examine the potential impacts of this change on migratory bird populations and the prevalence of baiting. Third, there is no need for legislation because the matter is being dealt with administratively through an open, public process.

First, I am concerned that enforcement against hunters who use bait will be crippled by this legislative change. For over 60 years, Federal courts have interpreted the MBTA as imposing strict liability for misdemeanor violations, including hunting birds over bait. By changing the strict liability standard to the scienter standard (that the hunter "knew or should have known" about the bait), H.R. 2863 will make it very difficult for enforcement officers to prove that a hunter had such knowledge. As U.S. Magistrate Judge Frederic N. Smalkin, District of Maryland, wrote in a statement to Congress in 1984,

"... in addition to being a shield for the innocent, such a requirement could be a windfall for the guilty, in view of the difficulty of proving scienter beyond a reasonable doubt ... the Government would have to come up with some direct proof of participation in the baiting, ownership of the property, or some other circumstance directly proving scienter if it were made an express element of the offense. It would appear to me from my practical perspective that the requirement of proving scienter would effectively curtail enforcement of the prohibition of baiting."

Judges have repeatedly upheld the strict liability standard, in light of the practical difficulties of proving that a hunter knew about the presence of bait. Over the last 62 years of case law, hunters and enforcement officers have understood this unambiguous and effective standard of proof.

As judges, wildlife officers, and the Fish and Wildlife Service have stated repeatedly, passing H.R. 2863 will protect hunters who purposely bait birds to the gun. Hunting over bait violates the spirit of fair chase and is unsportsmanlike. Birds can

be so attracted to bait and focused on the abundant food resources that they do not perceive danger from nearby hunters. This legislation would protect hunters who easily kill birds that are virtually drunk from food—if caught, the hunters only have to claim that they did not know that bait was present. Other hunters will actually have a disincentive to find out if a field is baited before they hunt there. Moreover, hunters using bait may also exceed their bag limits. In light of the difficulties of enforcing baiting restrictions with the scienter requirement, it is no surprise that the Federal Wildlife Officers Association also opposes H.R. 2863.

Part of the wildlife officers' concern is that the doctrine of strict liability applies not only to baiting prohibitions, but also to other forms of take of migratory birds. They worry that if H.R. 2863 becomes law, judges could rule in the future that the new scienter requirement extends to other types of cases, including all of the misdemeanor provisions of the Migratory Bird Treaty Act. This could have far-reaching consequences, indeed. For example, birds are attracted to open oil pits, and when oil companies do not cover the pits, hundreds of birds can die in them. In many cases, it would be difficult to prove that the company knew that their open pits would kill migratory birds, and enforcement would be severely curtailed. This can apply to oil spills as well. In 1996, a terrible oil spill occurred along Rhode Island's coast. For 8 days, dead and injured migratory birds washed up on shore and were retrieved—the final count of dead birds that could be recovered was 300. In January 1998, the owners of the oil barge were sentenced to a \$3 million fine for violating the Migratory Bird Treaty Act. The strict liability standard was essential to enforcement of the Act in that case. Do we want this to happen again?

In addition to poisoning by oil spills, strict liability is important for penalizing companies that kill birds through pesticide poisoning, building construction, and power line strikes. Awareness of the strict liability standard induces companies in these and other industries to take measures to prevent killing migratory birds. Changing the strict liability standard could result in an increase in all kinds of activities that cause bird kills.

In light of the potentially dramatic effects of changing the strict liability standard and the opposition by conservation groups and wildlife officers, we must ask ourselves why this change is being considered. There is no crisis that necessitates a drastic change by Congress. True, we must be sympathetic to the hunter who was invited to hunt on someone's property and then receives a misdemeanor for baiting when he or she did not know that the bait was present. In cases like these, however, the judicial system provides a crucial check by minimizing the sentence for such an unwitting offender. We simply do not need a quick but potentially far-reaching change right now. Instead, we have every reason to carefully consider the arguments for and against the change. The U.S. Fish and Wildlife Service must be able to analyze how this change is likely to affect the prevalence of baiting and how it will impact bird populations. This analysis should include the combined effects of changes in hunting regulations and widespread habitat destruction and degradation. An Environmental Impact Statement (EIS) under the National Environmental Policy Act would be warranted if this change were to be proposed administratively. An EIS would address all of these factors and compare their likely effects with the status quo.

In addition, the U.S. Fish and Wildlife Service is in the middle of rulemaking on this issue, and a legislative change right now would undermine that process. The agency has listened to concerns on all sides of this issue and published a proposed rule for public comment on March 25th. The public comment period will expire on October 1. Legislation on baiting would explicitly preempt the agency's decisionmaking on baiting.

The Fish and Wildlife Service's monitoring of duck populations indicates that now is a time to take caution with managing waterfowl populations. The Waterfowl Breeding Survey, conducted by U.S. and Canadian officials since 1955, indicates that through 1996 the long-term population of Northern Pintails is down 43 percent and Scaups are down by 36 percent. The American Black Duck population also has experienced a significant long-term decline. For the first time in history, the Canada Goose hunting season in the Atlantic Flyway has been closed since the 1995–1996 season because of a steep decline in their breeding population. The breeding survey for these geese revealed a decline from 180,000 nesting pairs in 1988 to 29,000 pairs in 1995 (when the season was closed). Overhunting was identified as a major factor in that decline. Given these population declines and the increasing threat of habitat destruction throughout the ranges of migratory waterfowl, taking measures that would increase baiting and bird kills is especially risky.

For all of these reasons, changing strict liability for hunters who use bait is not the solution to a problem faced by a small number of innocent hunters. For decades, Defenders of Wildlife has defended the Migratory Bird Treaty Act because it is one

of the most important laws protecting wildlife in the United States. The migratory bird treaties with Canada, Mexico, Great Britain, Japan, and Russia recognize that migratory birds are a valuable, multi-national resource that must be protected across borders from numerous threats. Any change to the Migratory Bird Treaty Act should be carefully examined and judged as to whether migratory birds will continue to be protected and managed sustainably. Liberalizing baiting restrictions will likely increase the number of hunters who use bait, which will considerably complicate management of this important resource and put bird populations at risk.

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STATEMENT OF BRENT MANNING, DIRECTOR, ILLINOIS DEPARTMENT OF NATURAL RESOURCES, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Good Morning, Mr. Chairman. I am Brent Manning, Director of the Illinois Department of Natural Resources, and chairman of the IAFWA ad hoc Committee on Baiting. Thank you for the invitation to testify today on behalf of the Association on this important issue regarding the regulation of hunting of migratory game birds. The Association supports the change in the standard for baiting violations from strict liability to one of "knows or reasonably should know" as reflected in H.R. 2863, plus the addition of liability for those who place or assist in the placement of bait so as to create a "baited area." We believe this change will bring needed consistency to law enforcement, while continuing to protect the migratory bird resource.

The Association, founded in 1902, is a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of all 50 states, the Commonwealth of Puerto Rico, and 8 Canadian provinces and 2 territories. The Association has been a key organization in promoting sound resource management and strengthening Federal, state, and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

The International Association of Fish and Wildlife Agencies, since its founding in 1902, has been a strong and consistent supporter of migratory bird conservation. No organization has been more dedicated to the protection, restoration and sustainable use of the waterfowl resource than this Association. As you are aware, the State fish and wildlife agencies are public trustees of fish and wildlife resources within their borders and have statutory authority and responsibility for conserving these resources for the use and enjoyment of present and future generations of the people of the States. State jurisdiction for migratory birds is concurrent with the U.S. Fish and Wildlife Service (FWS). The conservation of migratory birds is thus of vital interest to our Association and the citizens of this country who enjoy these resources.

In most States through a cooperative agreement between the FWS and the State fish and wildlife agencies, State conservation officers enforce Federal conservation laws and regulations. State conservation officers often supplement a Federal law enforcement staff of only one or two officers per state. Thus, State conservation officers are frequently more familiar with local agricultural practices, bird populations and landowners. It seems important to us that the baiting regulation language be of such clarity and certainty that State and Federal law enforcement officers apply it with a significant amount of consistency. It is also important that hunters, landowners, outfitters and guides understand and respect the rules. We believe H.R. 2863 provides that consistency in the liability standard for baiting violations.

During the early years of our Association, we were instrumental in calling for and contributing to the drafting of the Migratory Bird Treaty with Great Britain on behalf of Canada, which was ratified in 1916. We saw then the need for Federal involvement in the conservation and regulation of the take of migratory birds. The Migratory Bird Treaty Act was subsequently signed into law in 1918. This was followed by the passage of the Duck Stamp Act in 1934 and the Pittman-Robertson Act in 1937, both of which established funding for the conservation of these resources, and in which the Association was actively involved. The Association was primarily responsible for establishment of the four administrative flyways in 1947 to coordinate information and recommendations from the States and Canadian provinces to the U.S. Federal regulatory process, and worked actively to secure passage of the North American Wetlands Conservation Act of 1989, Farm bills, and others to facilitate habitat conservation. In short, the Association has a long history of key involvement in issues regarding the protection and management of migratory birds.

For the past 2 years, the Association's ad hoc Committee on Baiting has undertaken an exhaustive review of the migratory bird hunting regulations that pertain to baiting (50 CFR 20). Waterfowl biologists, wetlands managers, wildlife enthu-

siasts, agency directors, law enforcement officers and hunters provided the IAFWA with input and advice. The recommendations we have submitted to the FWS as they promulgate a rule change on this issue protect the migratory game bird resource, clarify the intent of the regulations and promote the management of natural wetlands communities for the benefit of migratory birds and other wildlife.

The one issue that the FWS has declined to address in its proposed rule is that of strict liability, which is the subject of H.R. 2863, and this hearing today. The Association supports the replacement of the strict liability standard with the standard adopted in 1978 by the U.S. Court of Appeals for the Fifth Circuit (commonly referred to as the *Delahoussaye* decision). The Association's support for this change, and the other recommendations of the ad hoc Committee on Baiting, were recently endorsed by our membership on September 14, 1998, in Savannah, GA.

Under the strict liability standard, individuals unknowingly hunting waterfowl or doves a mile from bait—and without any knowledge of the presence of that bait—have been cited. We consider this unreasonable, unnecessary and unacceptable. It has been incorrectly suggested that U.S. courts have universally embraced the standard of strict liability. The Sixth Circuit in 1984 characterized the standard in the following way:

"We concede that it is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only." *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984).

Furthermore, in the 1978 *Delahoussaye* case, the U.S. Court of Appeals for the Fifth Circuit rejected the strict liability interpretation. Instead, the Court required at a minimum that the presence of bait could reasonably have been ascertained by the conscientious hunter. The Court went on to say:

"Any other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable." *United States v. Delahoussaye*, 573 F.2d 910, 912-913 (5th Cir. 1978).

The Fifth Circuit does not follow the strict liability standard to this day.

Our Association's recommendation is consistent with the Fifth Circuit's decision. Liability should require that a hunter knows or reasonably should know that an area being hunted is baited. Our proposal is essentially identical to H.R. 2863. This bill does not mean that hunters will have a "free pass" to hunt over a baited field. Quite the contrary. Hunters would be responsible for taking reasonable efforts to ensure they are not attempting to take migratory game birds by the aid of bait or baiting. Indeed, as the court in *Delahoussaye* stated, a hunter can reasonably be asked to take the precaution of clearing the area before he or she hunts. Hunters should ask the guide, manager or landowner about the presence of bait, inspect the hunting area personally and assess the behavior of the hunted birds. Under the proposed standard of liability, the hunter will be judged, not just on whether he or she knew the area was baited, but also on whether he or she should have known the area was a baited area.

I have heard it said that this bill will require state and Federal agents to prove hunter knowledge and intent. Allow me to set the record straight. This bill would not require an officer to prove the hunter's intent. Nor will this bill require knowledge on the hunter's part. It merely requires that the hunter should reasonably have known the area was baited.

I have also been told that all a hunter would have to do to avoid a citation is to claim not to have known about the presence of bait. That is also not accurate. At issue here is whether the hunter should have known—either by an inspection of the area or by the behavior of the birds. The issue is not whether the hunter did or did not in fact know.

Some have complained that it will be impossible to obtain convictions under the *Delahoussaye* standard. We have seen no data to support that claim and are not aware of any significant difference in rates of conviction or pleas of guilty between states currently under the *Delahoussaye* standard and those that are not. Let me provide one example. Fish and Wildlife Service agents are on record stating that migratory bird baiting cases have dropped precipitously in Louisiana during the last decade. The agents attribute the decline to better state/Federal cooperation, negative publicity about the extent of baiting and tougher penalties handed down by Federal judges and magistrates. I would like to remind the committee that this "crack down" on illegal baiting and other related activities took place under the "knew or should have known" *Delahoussaye* standard of liability as proposed by this bill.

It has also been alleged that any standard other than strict liability will measurably and seriously harm the migratory bird resource. There is no basis for that concern. Allow me to provide one example why. The Fish and Wildlife Service's current

approach to regulating the impact of harvest on ducks is known as Adaptive Harvest Management or AHM for short. AHM takes into account variations in harvest rates caused by fluctuations in hunting pressure, habitat, bird populations, season length and bag limit. This system makes annual adjustments for these factors. No waterfowl expert with whom we've consulted believes the adoption of the *Delahoussaye* standard will result in a measurable increase in harvest. But even if it did—and again there is absolutely no evidence to support that prediction—AHM would compensate by prescribing shorter seasons or reduced bag limits or both.

Opponents of this bill have claimed that the proposed minimum form of scienter would apply to all other "takings" of migratory game birds. Examples such as a mining company using cyanide leach, a farmer using harmful pesticides and a refinery spilling oil have been offered. This bill eliminates the strict form of liability in baiting cases and replaces it with a minimum form of scienter in such cases—not in all other forms of "takings." Any suggestion to the contrary is incorrect.

In 1990, a Law Enforcement Advisory Committee created by the Fish and Wildlife Service found that enforcement of the "baiting" regulations was "confusing" and "too complex," and recommended that an effort be made to clarify and simplify the existing regulations. Earlier this year the Service inaugurated a rulemaking proposal to "clarify and simplify" the baiting regulations "in response to public concern about interpretation and clarity of the regulations" (63 Fed. Reg. 14415, March 25, 1998). The Service noted that it had received comments from State wildlife management agencies, the general public, hunters and conservation organizations that the baiting regulations "are outdated, unclear, and difficult for the general public to interpret and understand." Specifically addressing the strict liability standard, the Service recognizes in its current rulemaking proposal that "application of the standard to baiting regulations is of concern to many hunters." Nevertheless, the Service proposes no change in the application to hunters of the strict liability standard.

I referred above to the Catlett decision where the U.S. Court of Appeals for the Sixth Circuit characterized strict liability in this context as a "harsh rule." The court went on to say:

It is for Congress and the Secretary of the Interior to establish and change the policies here involved." 747 F.2d at 1105.

Because the Fish and Wildlife Service declined to take a "hard look" at the application of strict liability to hunters in baiting cases, Congress should do so.

Our Association also supports the creation of a new violation of the Migratory Bird Treaty Act as proposed in this bill. We share the belief that hunting club owners or operators who place or direct the placement of bait to attract migratory game birds to unknowing hunters should be subject to prosecution. This unethical and unfair exploitation of our migratory bird resource, undertaken for personal gain or profit, should be expressly prohibited.

The International Association of Fish and Wildlife Agencies appreciates the opportunity to address you today. I offer the Association's as well as my personal assistance in reaching a goal I believe we share—common sense regulations that protect the migratory game bird resource and the future of responsible hunting. Thank you.

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STATEMENT OF THE AMERICAN BIRD CONSERVANCY; SUBMITTED BY GERALD W.  
WINEGRAD, VICE PRESIDENT FOR POLICY

Mr. Chairman and Members of the Senate Committee on Environment and Public Works: American Bird Conservancy submits these comments in opposition to the passage of H.R. 2863, which would amend the Migratory Bird Treaty Act (MBTA). The American Bird Conservancy is a national non-profit organization dedicated to the conservation of birds. Through our 73 member organizations on our Policy Council, we work collaboratively to enhance avian populations in the United States and throughout the Western Hemisphere. Our members include the Environmental Defense Fund, World Wildlife Fund, Center for Marine Conservation, Peregrine Fund, and the Cornell Ornithological Laboratory. Members who have written and/or testified before the committee in opposition to H.R. 2863 include the National Audubon Society, National Wildlife Federation, Defenders of Wildlife, and the Humane Society of the United States. In addition, the Izaak Walton League, U.S. Fish and Wildlife Service, Federal Wildlife Officer's Association, PEER, and the Secretary of Maryland's Department of Natural Resources have written in opposition to this legislation.

H.R. 2863 is mislabeled as the "Migratory Bird Treaty Reform Act" and would severely hinder the enforcement of anti-baiting laws and the conservation of migratory birds. We in the conservation community view the MBTA as the nation's most important law ever enacted for the protection of migratory birds. Originally passed

by Congress in 1918, the Act was designed to implement the Migratory Bird Treaty of 1916 between Canada and the United States. The Treaty and the MBTA were enacted to end the indiscriminate slaughter of migratory birds that was occurring. The Treaty has since been extended to Mexico, Canada, Russia, and Japan. The MBTA established a strict liability standard in 1918 that has been essential in the conservation of migratory birds, both game and non-game species. This strict liability standard has been used over the last 80 years to successfully prosecute the illegal killing of migratory birds by oil spills, pesticides, toxic waste pools, and deliberate poisonings. Since 1935, the MBTA and its strict liability standard have been used to protect migratory game birds from illegal hunting using bait. We urge the committee not to eliminate this standard and require "scienter" in all illegal baiting cases. We believe that such a change will undermine the MBTA and the protection of migratory birds. The U.S. Fish and Wildlife Service has proposed rule changes at 50 CFR Part 20 dated March 25, 1998 relating to baiting and agricultural practices designed to address hunters' concerns. The comment period ends on October 1, 1998. We urge the committee to allow this rulemaking to proceed and to avoid action to reverse the strict liability standard and the 65 years of law enforcement and case law under its provisions.

Violations of the Migratory Bird Treaty Act constitute criminal offenses and include application of a "strict liability" standard. Because of this, since 1916 the MBTA has provided significant protection to migratory birds. Under strict liability, the fact that a person acted in a way so as to cause a prohibited result is sufficient basis to impose liability. Thus, in the prosecution of a strict liability crime, the government need not prove "scienter" (that the accused knew that he or she was violating the law) or even that the accused should have known he or she was violating the law. Federal courts, with one exception, have repeatedly upheld application of the strict liability doctrine. For example, The MBTA and its strict liability provision were successfully used to prosecute Eklof Marine, the offenders in the 828,000 gallon oil spill in that occurred in January, 1996 in Rhode Island's Block Island Sound. Under the strict liability standard of the MBTA, a \$3 million penalty was assessed by a Federal District Court earlier this year against the offending company for killing migratory birds. Eliminating the strict liability standard in baiting cases may prevent such applications of the MBTA if changes as directed by H.R. 2863 are made Congressionally or judicially.

Discussing strict liability as applied to baiting cases, the courts have long recognized the standard's importance in protecting migratory birds. In *U.S. v. Schultz*, 28 F. Supp. 234 (W.D. Kentucky 1939), the court stated: "The beneficial purpose of the treaty and the act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of defendants accused of violating the provisions of the act." In *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), the court stated that strict liability was utilized to "enact the broad policy of protecting an important natural resource, migratory game birds." In *U.S. v. Miller*, unpublished (D. Ariz. 1982), the court stated: "The importance of the goal of preserving certain migratory birds in our environment, the difficulty the government would have in enforcing its laws if it were required to prove scienter . . . and the contemplated leniency of the sentence need all be considered." In written testimony to the U.S. Congress in 1984, Judge Frederic Smalkin, District of Maryland, wrote: "In addition to being a shield for the innocent, such a requirement [to prove scienter] could be a windfall for the guilty, in view of the difficulty of proving scienter beyond a reasonable doubt. . . . The requirement of proving scienter would effectively curtail enforcement of the prohibition of baiting."

These cases clearly indicate the absolute need and fairness of application of the strict liability standard. Again, the doctrine of strict liability applies equally to hunters and to industrial concerns, agricultural concerns, oil transporters, and traders in eagle claws and feathers. The strict liability standard has been important in the prevention of the illegal killing of migratory birds not only by hunters but by these other entities. The U.S. Fish and Wildlife Service cites these examples of changes that industries have made to comply with the strict liability standard: the chemical industry has made changes in the manufacture and use of pesticides that are toxic and deadly to migratory birds; the electric power industry has taken steps to prevent electrocution and power line strikes to migratory birds; the agriculture community modifies farming practices to prevent the accidental loss of migratory birds due to pesticide poisonings; the petroleum and mining industries have implemented measures to prevent contamination to migratory birds at petroleum pits, open oil pits, and cyanide leach operations; the commercial aquaculture industry modifies its operations to reduce bird mortality; and developers monitor construction sites to avoid destruction to migratory birds, their habitat, nests, and young. The vast majority of hunters also scrupulously avoid shooting waterfowl over bait and want to

know if a shooting area is "dirty" to avoid citations under the strict liability standard. The committee should not act to change this important piece of the Migratory Bird Treaty Act. The strict liability doctrine has long been recognized in Federal courts throughout the Nation as a reasonable and necessary element in protecting the Nation's valuable migratory bird resource.

H.R. 2863 would drastically change the law regarding baiting of migratory waterfowl that has been in effect since 1935. By requiring "scienter" or knowledge in every baiting case, a strict liability statute would be modified to ease enforcement against illegal baiting. Such a change damages the MBTA and places the nation's waterfowl resources at risk of over harvest. That is why the Federal Wildlife Officers Association and State wildlife enforcement agencies vehemently oppose these proposed changes. Maryland is a major waterfowl hunting State and is one of the nation's greatest migratory waterfowl wintering habitats. The Secretary of Maryland's Department of Natural Resources has sent a strong letter of opposition and the Superintendent of Maryland's Natural Resources Police has written that such a change in requiring scienter "... will eliminate our ability to effectively enforce the baiting laws. . . .". The Superintendent further states that such a proposal. . . "will undoubtedly lead to the collapse of an already fragile resource." Copies of these letters have been provided to committee staff and I ask that they be made part of the record. U.S. Fish and Wildlife Field Agents share these concerns, are strongly opposed to such changes, and have expressed their concerns in writing to the chairman and committee staff. Simply put, these Federal and State field officers strongly believe that H.R. 2863 will undermine their ability to enforce anti-baiting laws that have been in effect since 1935. What is the pressing need? As noted, proposed regulations published on March 25, 1998 by the USFWS attempt to resolve some of the issues surrounding current anti-baiting provisions. While the pending regulations initially rejected adding the scienter requirement, these regulations are not finalized. Why not allow the regulatory process to proceed before acting?

H.R. 2863 is a serious weakening of the MBTA and any such changes should be enacted only after much study and deliberation. How will enactment of H.R. 2863 better protect our nation's waterfowl? What impact will the passage of H.R. 2863 have on waterfowl populations? We cannot find adequate answers to these questions that would justify the passage of H.R. 2863. We do know that baiting results in much higher kill rates and by the mid-1930's baiting was resulting in a substantial over harvest of birds. Such high kill rates and over harvest led to its prohibition in 1935. In an article in Illinois Natural History Survey Bulletin, Volume 23, Article 2, November 1944 by Frank C. Bellrose, Jr., data analysis indicated that the kill rate was two to three times as great before the anti-baiting provisions were enacted in 1935. Our wildlife resources cannot sustain any where near such an increase in kill rates due to increased baiting that may occur as a result of passage of H.R. 2863. Please consider that when the initial anti-baiting provisions were enacted in 1935, there were 635,000 hunters; today there are 3.1 million hunters of migratory waterfowl.

The Courts have interpreted the current regulations in many cases and this case law gives clarity to the existing regulations. What is needed is better education not a weakening of present regulations. Adding the knowledge requirement would undermine 63 years of anti-baiting prohibitions and enforcement. We must act to prudently manage our waterfowl resources, permitting lawful and sustainable hunting, but not allowing over harvest. Liberalizing anti-baiting regulations could lead to over harvest, could alter the distribution of migratory waterfowl, and could alter migratory behavior. Additionally, baiting brings into question the "sportsmanship" of hunting.

Unfortunately, a number of our traditionally hunted migratory waterfowl are in steep declines. The population of breeding ducks dropped 8 percent in 1998 over the previous year according to the U.S. Fish and Wildlife Service's annual breeding duck survey. Breeding populations of Mallards dropped slightly while other species continued steep declines. Northern Pintails were down 29 percent over the previous year, Northern Shovelers down 23 percent, Green-winged Teal were down 17 percent, and Scaup were down 16 percent. These steep declines were a continuation of substantial declines documented by U.S. and Canadian officials since 1955 in populations of certain hunted waterfowl species. The breeding surveys indicate that through the 1998 counts, the long-term population of Northern Pintails was down 43 percent, Scaups were down by 36 percent, and the American Black Duck population was down by 28 percent. For the first time in history, the Canada Goose hunting season in the Atlantic Flyway was closed for the 1995-1996 season because of a steep decline in their breeding population and remains closed. The breeding survey for these geese revealed a decline from 180,000 nesting pairs in 1988 to 42,200 pairs in 1998. The 1998 breeding season was a major disappointment as the

number of breeding pairs was 63,200 in 1997. One of the major reasons attributable to the decline of Canada Geese precipitating the hunting closure was the over harvest by hunters. This harvest was exceeding 40 percent of the adult populations of the Atlantic Flyway Canada Goose. These declines in waterfowl populations buttress the case against any weakening of anti-baiting regulations and enforcement. H.R. 2863 should be defeated. Relaxing anti-baiting provisions of the MBTA may lead to a further decline in these species.

We believe that the MBTA is essential to the conservation of birds in North America and we would vigorously oppose any weakening in its implementation and enforcement. H.R. 2863 does not reform the MBTA but rather guts its anti-baiting provisions by adding the scienter provision. Additionally, baiting brings into question the "sportsmanship" of hunting. We request your support for our migratory birds and our wildlife enforcement officers in rejecting this legislation.

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MARYLAND DEPARTMENT OF NATURAL RESOURCES,  
February 10, 1997.

COL. V.J. GARRISON,  
*Georgia Department of Natural Resources,  
Atlanta, Georgia 30334.*

DEAR COL. GARRISON: The Maryland Natural Resources Police strongly oppose the proposed revision to the Federal baiting regulation, 50 CFR 20.21 paragraph (i). If this proposal is approved, the new Federal baiting regulation will undoubtedly lead to the collapse of an already fragile resource.

The proposed change requiring law enforcement and prosecutors to prove that "the person knows or through reasonable care should have known," that bait was present, will eliminate our ability to effectively enforce the baiting laws for all migratory game birds. This change will require that an officer actually observe the bait being placed in the hunting area; which even with the best planned surveillance operation, is a rare occurrence.

Since the inception of the Federal baiting law in 1935, never has a person having knowledge been a part of the Federal baiting law, making it apparent that those who created the law realized that "strict liability" was the real core of the law. Any change in this concept would certainly promote a "willful lack of knowledge" among hunters and defeat the very purpose of the law. Even the most ethical hunter would be discouraged from making an effort to determine if an area was baited, as it would be in his/her best interest not to know.

Another proposed revision to the baiting law relates to the "alteration of natural vegetation" and the exclusion of millet as an agricultural crop. This proposal would allow hunters to bush hog or otherwise scatter the seeds of natural vegetation and millet, then hunt over the area. There is no requirement that the feed be removed prior to hunting the area, only that no alteration of natural vegetation or naturalized plants occur within 10 days prior to the waterfowl season. The hunter could literally be standing in feed inches deep, shooting ducks and geese. The legalization of this practice would unfairly concentrate birds for the benefit of those who could afford to join private hunt clubs or otherwise have the ability to practice this type of activity, thus limiting the opportunities available to the average hunter. This change would potentially result in overbagging and generally increase hunter success.

Waterfowl populations are presently at critical levels, and any liberalization of the current Federal baiting regulations will adversely impact the future of this resource.

As a conservation law enforcement agency charged with protecting the natural resources, it is incumbent upon the Maryland Natural Resources Police and all conservation agencies/organizations to oppose this legislation.

I urge your support on this issue by voicing your opposition on the proposed Federal baiting law to Secretary Bruce Babbitt, Department of the Interior and to your U.S. Senators and Congressmen. By defeating this proposal we will play a vital part in ensuring that there is a viable population of all migratory game bird specks to be enjoyed by future generations. Again, I thank you for your support, and if I may be of any assistance to you or your organization, please feel free to contact me.

Sincerely,

COLONEL JOHN W. RHOADS,  
*Superintendent.*

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MARYLAND DEPARTMENT OF NATURAL RESOURCES,  
*Annapolis, Maryland 21401, June 25, 1998*



THE HONORABLE PAUL S. SARBANES,  
*Senate Hart Office Building,  
 Washington, DC 20510.*

Dear Senator Sarbanes: I am writing to express Maryland's strong opposition to H.R. 2863 and S. 1533 which would substantially change the Federal migratory bird baiting regulations by eliminating the "strict liability" requirement from the statute. I have been advised by our Natural Resources Police and Wildlife and Heritage staff that this change will have a detrimental impact on Maryland's, and the nation's migratory bird resources.

The Maryland Department of Natural Resources did not have an opportunity to present testimony before the Committee on Resources, Fisheries Conservation and Wildlife and Oceans, in opposition to H.R. 2863. It is my understanding that this bill passed out of committee favorably and will be heard on the House floor in the very near future. Regarding S. 1533, it is my hope that the Department would be provided the opportunity to offer testimony before the appropriate Senate committee expressing Maryland's opposition.

Thank you in advance for your understanding and assistance in this important manner.

Sincerely,

JOHN R. GRIFFIN.

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#### FOWL PLAY IN WASHINGTON

(By David Helvarg)

For more than 60 years it has been illegal to use bait hunting waterfowl, a once widespread practice that decimated whole populations of birds and continues to result in more than 800 violations per year. Even so, the U.S. Fish and Wildlife Service (USFWS) is planning to loosen its birdbaiting regulations and Congress is pushing a bill to reform the Migratory Bird Treaty Act and weaken enforcement of the baiting law.

Last March the USFWS tried to squelch dissent on the issue by instructing its law enforcement officer not to speak publicly about it. "We've been told to keep our mouths shut," complains one agent who spoke with "Sports Afield" on condition of anonymity, and we know more about this baiting business than anyone alive."

Waterfowl lured to seed and other baits will fly directly into discharging shotguns in their rush to feed. So why is the Government permitting baiting every year of efforts by resource agencies, wetlands activists and conservation-minded hunters to restore in America's migratory bird populations? The answer may reflect the political juice of certain interested parties rather than any real need for reform.

The internal Fish and Wildlife memo gagging its agents noted the "very difficult time" Congressman Don Young (R-AK) and Senator John Breaux (D-LA) were giving agency director Jamie Clark. Among those who've been caught hunting on bait are former Kentucky Governor Julian Carroll, Florida sheriffs, Virginia judges, and a political adviser to Senator Phil Gramm (R-TX).

Many Washington politicians and lobbyists like to get in a quick hunt at elusive duck clubs and private reserves on the Eastern Shore of Maryland, including several that have been cited for baiting.

The latest wave of regulatory reform can be traced to two specific law enforcement actions during the anti-Federal hysteria of 1994 and 1995. The first took place when Fish and Wildlife agents on ariel patrol spotted an Illinois hunt club illegally using millet to attract ducks and called in local game wardens. Club member Randy Vogel tried to get the citation fixed through his friend, state Department of Natural Resources director Brent Manning. When that didn't work, he and other hunters fought the case in court and lost. Vogel then founded the Sportsman's Defense Fund to oppose "overzealous law enforcement" while Manning, through the International Association of Fish and Wildlife Agencies, began pressing for regulatory changes in Federal baiting laws.

One year later a dozen agents in Dixie County, Florida busted the heavily baited Predators Dove Hunt, a charity shoot for the Florida Sheriffs' Youth Ranches that featured a silo's worth of cracked corn, millet and wheat. During the raid agents scored more than 500 bird carcasses, which included non-game birds and out more than 80 citations to sheriffs and state politicians, among others.

These raids led to a Congressional hearing with House Resources Committee chairman Don Young, joined by Representative Helen Chenoweth (R-ID), focusing on what Young called "the heavy hand" of the Feds. The baiting raid was even labeled a "little Ruby Ridge," a reference to the FBI shootout with Idaho white sepa-

ratist Randy Weaver that left Weaver's wife and son dead—although the only shooting victims in Florida appeared to be doves and bluejays. The anti-baiting regulation, Young declared, "is a bad law. It has to be changed."

Under the law, anyone found hunting on bait will be cited and fined, regardless of whether or not they say they knew it was there. Young's proposal would require agents to prove hunters knew or should have known they were shooting on bait.

If they enact Young's language it will destroy baiting regulations that have been there since 1935, "cause it's near impossible to prove what's in someone's mind," says Dave Hall, a recently retired agent from Louisiana. "And we'd have to stake out every site to catch them in the act, and there are only about 200 agents for the whole nation."

"If there is a bucket of corn sitting in a field or a legitimate baiting problem, the guilty hunter will be successfully prosecuted," Young insists.

The Fish and Wildlife Service's proposed baiting rule changes (originally in Young's bill the agency agreed to adopt them) would legalize the cutting of millet and other "manipulation" of plants. Pointing out that the loss of wetlands is the major threat facing migrating and nesting waterfowl, head of USFWS's Management Program Paul Schmidt says the new rules will inspire private landowners to establish new wetlands and plant them with a variety of feed to benefit the birds. Asked whether such feeding stations won't threaten bird populations by making them easy targets for lazy hunters, Schmidt says, "We protect populations by the way we set seasons and bag limits."

"If everyone who hunted killed their bag limit, good grief, there'd be no ducks left," counters one agent. "The people pushing this issue are the big duck clubs. Suppose everyday duck hunters like me and my son want to go to our local marsh. All the ducks will be headed over to the club where they're planting and manipulating millet for their \$300-a-day clients. But if you get taken to a blind, and treated like a king, and have 40 or 50 mallards lined up in front of you, where's the fair chase?"

The USFWS has extended its comment period for proposed baiting, regulation changes to October 1, at which point agency officials will tabulate the results and announce their next action. In the meantime, if the bill to reform the MBTA is not passed early this fall, its proponents will be required to start from scratch during the next congressional session in January 1999.

*September 29, 1998.*

HONORABLE JOHN H. CHAFEE, *Chairman,*  
*Committee on Environment and Public Works,*  
*Dirksen Senate Office Building,*  
*Washington, DC 20510-6175.*

DEAR SENATOR CHAFEE: During this morning's hearing in the referenced matter, the witness for the International Association of Fish and Wildlife Agencies, Mr. Brent Manning, who is also Director of the Illinois Department of Natural Resources, pointed out that the Fish and Wildlife Service could not amend the strict liability rule for hunting over a baited field on the basis of its current rulemaking proposal of March 28, 1998. The basis for Mr. Manning's observation is set forth in the following.

The proposed rule of the Fish and Wildlife Service dated March 17, 1998, proposes to clarify existing regulations with respect to current migratory bird habitat conservation practices (i.e., moist soil management), and public comment was invited on specific changes in regulatory language to that end. 63 Fed. Reg. 14415 (March 28, 1998). In its rulemaking, the Service expressly declares: "At this time, no changes are proposed in the application of strict liability to the migratory game bird baiting regulations." 63 Fed. Reg. at 14416.

Not only does the preamble state that no changes to strict liability are proposed in the March 1998 rulemaking, the Service in its preamble to the proposed rule sets forth several policy reasons why such a change would in its view be unwise. While the International Association certainly does not agree with these views, the point is that the Service's proposal foreshadows maintenance of strict liability, not a change in strict liability.

The notice and comment provisions of the Administrative Procedure Act require that notice include either the terms or substance of the proposed rule. 5 U.S.C. § 553(b)(3). While a proposed rule need not be identical to the final rule, if the final rule deviates sharply from the proposal, the question for a court would be whether the final rule is a "logical outgrowth" of the rulemaking proceeding. *American Federation of Labor v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985 (opinion of Starr, J.)). If the final rule deviates sharply, affected parties will be deprived of notice and

an opportunity to respond to the proposal. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546-550 (D. C. Cir. 1983) (opinion of Wald, J.). A "180" would likely be considered a "sharp" deviation.

Should the Service desire to change the strict liability standard for hunting over a baited field, a new rulemaking proceeding would be necessary.

Sincerely,

PAUL A. LENZINI, *Legal Counsel*,  
*International Association of Fish and Wildlife Agencies.*

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NORTH AMERICAN WILDLIFE ENFORCEMENT OFFICERS ASSOCIATION,  
*Lovettsville, VA 20180-8505, September 28, 1998.*

SENATOR JOHN CHAFEE,  
*Committee on Environment and Public Works*,  
*U.S. Senate*,  
*Washington, DC 20510-6175.*

DEAR SENATOR CHAFEE: My name is Bruce Lemmert and I am offering testimony regarding H.R. 2863, the Migratory Bird Treaty Reform Act of 1998. My testimony is on behalf of the over 7000 officers of the North American Wildlife Enforcement Officers Association (NAWEOA).

On June 19, 1998, NAWEOA officially took a position in opposition to any change in the strict liability doctrine as it exists with respect to the migratory bird hunting laws. NAWEOA feels that much of the illegal baiting of migratory game birds would be unenforceable of existence of scienter were required.

I respectfully ask that this aspect of the migratory bird hunting laws be left as is for the continued protection of our wildlife resources. This law has worked to the benefit of migratory game birds and to the benefit of sportsman and wildlife watchers, for many years and we believe that it would be counter-productive to change a proven law.

If we can be of assistance to you or if you need any type of clarification from us, please do not hesitate in contacting me.

Sincerely,

BRUCE A. LEMMER,  
*Executive Member, Region 6 NAWEOA.*

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NATIONAL AUDUBON SOCIETY,  
*September 28, 1998.*

Dear Senator: On behalf of the National Audubon Society, I'm writing to urge your opposition to S. 1533, the "Migratory Bird Treaty Reform Act."

The National Audubon Society has nearly one million members and supporters in the Americas, and it is dedicated to the preservation and protection of birds, other wildlife and their habitat. Throughout our history, we have worked diligently to establish a strong and effective legal foundation for the management of wildlife. These efforts have included encouraging the Congress to enact the Migratory Bird Treaty Act, and working for decades to protect this important statute from attempts to weaken its provisions.

There are a number of reasons why S. 1533 should not be enacted at this time. First, we believe any legislation to amend the Migratory Bird Treaty Act should be passed by the Congress only after long and careful scrutiny. The proponents of this legislation have failed to make a compelling case that there is a crisis that needs addressing. It is in the public interest to protect migratory birds, not just for hunters, but for all Americans. We have always set a very high standard of protection of migratory birds by using a strict liability test and, with one exception, the courts have upheld this standard. Any change from this standard should take place only after a compelling case has been made. We do not believe such a case has been made for S. 1533.

Second, the U.S. Fish and Wildlife Service is currently engaged in a rulemaking on baiting regulations to address legitimate concerns that have been raised by the hunting community. Until that rulemaking is completed, it would be premature to pass this legislation.

Third, the law enforcement personnel charged with protecting migratory waterfowl and enforcing Federal wildlife statutes feel this bill is ill-advised and will seriously complicate their job of battling illegal hunting. It is essential that we not ignore the views of these law enforcement officials and make potentially sweeping changes in the law based on a few isolated cases.

Finally, I think it is important that we thoroughly understand how this legislation will impact our conservation and management of migratory bird species. At the present time, the Fish and Wildlife Service is unable to tell us what impact this bill would have on wildlife populations, where and when. These are important questions that should be carefully addressed before any legislation is moved.

DEFENDERS OF WILDLIFE,  
*September 25, 1998.*

*U.S. Senate,*  
Washington, DC 20510.

DEAR SENATOR: Defenders of Wildlife, a national conservation organization with over 250,000 members and supporters, requests your assistance in opposing H.R. 2863, which was passed out of the House Resources Committee in April 1998. This bill would alter the Migratory Bird Treaty Act (MBTA) by severely undermining enforcement against hunting birds over bait. Defenders of Wildlife is not an anti-hunting organization, but we oppose this bill because, if passed, it would likely have a negative effect on bird populations and it would virtually preclude enforcement against hunters who use unfair, unsportsmanlike baiting practices.

For more than half a century, Federal courts have interpreted the MBTA as imposing strict liability for misdemeanor violations, including hunting birds over bait. H.R. 2863 would change the standard of proof regarding baiting from strict liability to the scienter standard (that the hunter "knew or should have known" about the bait). Such a change would make it exceedingly difficult to prosecute violations, overturn 62 years of Federal judicial case law, and increase the civil liability of investigating officers. As U.S. Magistrate Judge Frederic N. Smalkin, District of Maryland, wrote in a statement to Congress in 1984, "... in addition to being a shield for the innocent, such a requirement could be a windfall for the guilty, in view of the difficulty of proving scienter beyond a reasonable doubt ... it would appear to me from my practical perspective that the requirement of proving scienter would effectively curtail enforcement of the prohibition of baiting." U.S. Fish and Wildlife Service enforcement agents agree that this change imposes an almost impossible burden of proof.

H.R. 2863 with its "knew or should have known" standard of proof is opposed by numerous conservation organizations, including the National Wildlife Federation, the Izaak Walton League, the National Audubon Society, and the Humane Society of the United States. In addition, the Federal Wildlife Officers Association opposes the bill. The Secretary of Maryland's Department of Natural Resources opposes the legislation, and has sent a letter on the matter to the entire Maryland Congressional Delegation.

The U.S. Fish and Wildlife Service is opposed to H.R. 2863. The Service recently has given considerable attention to this matter, and they have drafted regulation changes on baiting. Proposed regulations are open for public comments until October 1. The proposed regulations contain changes and clarifications about what activities constitute baiting, but the Service purposefully left the strict liability standard intact. Therefore, not only would passage of H.R. 2863 undermine the Service which has carefully studied this issue, but it would significantly interfere with the rulemaking process on baiting that is already underway.

Changing the standard for baiting does not make sense because it would help to protect hunters who bait birds and would put wildlife enforcement officers at greater risk. Hunting over bait is unsportsmanlike. Birds can be so attracted to bait and focused on the abundant food resources that they do not perceive danger from nearby hunters. Protecting hunters who easily kill birds that are virtually drunk from food is particularly inappropriate because the same change would put enforcement agents at much higher risk of being accused of civil damages. Indeed, issuing a citation without probable cause to believe that the arrested had knowledge of the presence of the bait could easily lead to civil damages action. Moreover, changing to a "knew or should have known" requirement would increase the amount of time that officers spend developing a case against a hunter, and informants would have to be revealed during testimony in court, in order to prove knowledge. All of these factors—informants less willing to come forward publicly, increased time required to build a case, and increased civil liability for officers—would severely negatively affect enforcement agents and decrease the number of cases brought against hunters who violate the law.

The MBTA has been protecting migratory birds since its passage in 1918. Integral to its success has been the courts' interpretation of strict liability for misdemeanor violations. H.R. 2863 may have serious implications for the future viability of the

MBTA as a means of protecting migratory birds. Defenders of Wildlife is quite concerned that the resultant lack of enforcement against baiting would significantly decrease the U.S. Fish and Wildlife Service's ability to protect bird populations so that they are managed sustainably. Rather than protecting unsportsmanlike hunters, we urge you to join us in protecting bird populations and the MBTA by opposing H.R. 2863. Thank you for your time.

Sincerely,

LAURA C. HOOD,  
*Director, Science Department.*

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THE BAITING GAME

(By Ted Williams)

VOCAL HUNTERS ARE SEEKING TO RELAX THE BAN ON USING BAIT TO LURE BIRDS TO  
THE KILL

I have just come in from baiting mourning doves. Every fourth day since I started researching this article, I have sown a bucket of cracked corn on the grass between our barn and the locust trees. Now, as I write, doves are swirling out of a copper sky—"coming down the chimney," to use the old bait hunter's cliché. Doves are drab only at a distance. From 10 feet away I can distinguish shades of violet, pink, cinnamon, and iridescent purple. Bills are splashed with azure, wings and cheeks spotted as if held respectively by sooty fingers and a sooty thumb. There are white halos around obsidian eyes, white trim on long, tapered tails. I am struck by how closely this species is related to the passenger pigeon, its lost cousin, ushered into oblivion largely by unregulated hunting.

I am not shooting these doves, but neither am I doing them any favors. I have hooked them on junk food—the avian equivalent of French fries and Hostess Twinkies. They don't need it, but they can't resist it. Wilton, my 60-pound Brittany, barks and slavers at the window, and still the doves bob and strut and stuff their crops. I have converted these normally wary birds into the sort of idiot fowl that mill around your feet when you eat a sandwich in Central Park.

Ducks and doves will pitch into bait even when poachers are standing up and blasting away with shotguns. They become zombies, floating into the barrage with flaps down and landing gear extended. That's why hunting over bait was outlawed in 1935, under provisions of the Migratory Bird Treaty Act, which was enacted to save birds "from indiscriminate slaughter." In Illinois—the birthplace of the baiting tradition in the United States—a 1941 study demonstrated that annual waterfowl kills dropped from about 1 million birds with bait to about 175,000 without.

The Migratory Bird Treaty Act (MBTA), facilitated by a 1916 convention with Canada, makes it illegal to kill migratory birds except during hunting seasons established for a relatively few species by the Secretary of the Interior. Today the MBTA, amended to reflect similar agreements with Mexico, Japan, and the former Soviet Union, is this country's and the world's basic bird-protection law. But it and the birds it was written for are being jeopardized by hunters who would like to kill more game with less effort and who, therefore, seek to relax the regulation that prohibits baiting. Migratory-bird populations are already badly stressed by baiting, by far the most common of all MBTA violations. If baiting were legalized, increased kills would drastically reduce game bird populations.

A lot of the pressure is coming from the directors of the state game and fish departments, who are frequently pro baiting. Organized as the International Association of Fish and Wildlife Agencies, they are urging the U.S. Fish and Wildlife Service to make a legitimate excuse out of ignorance, a condition claimed by virtually every baiter apprehended during the past 62 years. Under the association's proposed amendment to the regulation, law enforcement personnel would be assigned the nearly impossible task of proving that a violator "knows or through the exercise of reasonable diligence should have known" that the area was baited. "Having to prove intent would basically mean our work is over," says a Fish and Wildlife Service agent, who asked that I not use his name, since he has been ordered not to speak to the press about the controversy.

The antibaiting regulation is under attack in Congress, too. On February 12, 1997, House Resources chairman Don Young (R-AK) introduced H.R. 741, the Migratory Bird Treaty Reform Act. The bill weakens the treaty in a number of ways, most seriously by codifying the request of the International Association of Fish and Wildlife Agencies to prove intent. "Neither the treaty nor the Federal statute calls for intent, and I don't see how you can make regulation that does," declares another

agent, who also asked for anonymity. "If they pass a law for intent, I think it's a violation of the treaty. In any case, it would be absolutely devastating to migratory birds."

Special Agent John Mendoza of the Fish and Wildlife Service agrees, pointing out that baiting virtually assures that hunters will get their bag limit, and a bag limit for every hunter every time out means a dangerous overkill. "There is nothing sporting about baiting," he wrote in an April 22, 1996, memo to his Agency's director. "Hunting over or with the aid of any form of bait. . . is illegal, unethical. . . . The anti baiting regulation does not need to be changed. Rather, people's greedy attitudes need to be called for what they are."

But calling things for what they are has never been the forte of the Fish and Wildlife Service. Mendoza was responding to a March 22, 1996, notice in *The Federal Register*, soliciting comments on his agency's plan to reassess the antibaiting regulation as it applies to growing and cutting food plants for ducks and geese in low, soggy places—moist-soil management," to use the agency's biobabble. The plan was inspired by disgruntled hunters, none more vocal than busted baiters. And the same complaints had prompted the service to invite the International Association of Fish and Wildlife Agencies to tell it how to improve the moist-soil rules.

Somehow the project got out of control. Before the association knew what had happened, people on both sides of the issue were shouting at it. To disperse the heat, it formed the Ad Hoc Committee on Baiting, which picked up the ball and, like Forrest Gump, ran down the field and off the field, hatching recommendations—bad, dangerous ones—on new and different issues. So the Fish and Wildlife Service now finds itself in a duck press. If it follows the Ad Hoc Committee's advice, migratory—game bird resources will be jeopardized. If it ignores the committee, it will be accused of trampling states' rights and maybe sued. Moreover, there is an Elmer Fudd figure cavorting around the nation's capital in the form of Don Young, whose duck-hunting strategy frightens even the Ad Hoc Committee. If Young succeeds in changing the regulation by law, no part of it can be relaxed or strengthened in response to real-world events except by a further act of Congress. And that could take more time than migratory birds have.

Since 1935 the antibaiting regulation has been amended 18 times. It has been tweaked, tuned, and tested not just by the Fish and Wildlife Service but also by the courts. A new statute or even a rewrite would destroy an enormous body of case law, paralyzing MBTA enforcement. Finally, baiting is now a "petty offense," carrying a maximum fine of only \$5,000. Add the element of intent, and the rationale for such leniency takes wing. The only fair and logical tradeoff would be to make baiting at least a misdemeanor, in which case the maximum fine would be \$100,000. But here's the rub: with misdemeanors, agents wouldn't be able to hand out tickets, which give the baiter the option of just mailing in the fine. They would have to seek criminal charges, which, they say, would create a paper blockage the Justice Department couldn't begin to cut through.

As an avid hunter of migratory birds, as well as an advocate for them, I naturally fear getting cited for inadvertently violating the Migratory Bird Treaty Act. And even if ignorance were an excuse, claiming it would be almost as embarrassing. So I was distressed to read about the victimization of clueless Floridians who had gathered in Dixie County on October 13, 1995, to enjoy each other's company, shoot a few doves, and especially, raise money for the Florida Sheriff's Youth Ranches. According to these public spirited folks, a dozen "overzealous" Federal wildlife officers in "inappropriate and provocative dress" (camouflage and boots) crashed the party, issuing 88 baiting citations and collecting \$38,850 in fines. A headline in the *Florida Times-Union* referred to the operation as "Little Ruby Ridge" (after the place in Idaho where FBI agents apprehended white separatist Randall C. Weaver and managed to kill his wife and son in the process) No one, save the officers, reported seeing any bait. State Senator Charles Williams, who had sponsored the event, explained that the Federal agents had "tarnished" the reputation of "innocent people."

In a letter to U.S. Representative Don Young, Alachua County sheriff Stephen M. Oelrich described the high profile of fellow fund-raisers "descended upon" by the Feds: "local ranchers, utility managers, state officials, and local elected county office holders. . . . Four Florida sheriffs were on the field that day, along with the Regional Director of the State Game and Fish Commission, Clerks of County Courts, and several people of leadership positions in their communities, all sharing in their embarrassment at this treatment from Federal officers."

An outraged U.S. Representative Cliff Stearns (R-FL) prevailed on the House Resources Committee to hold a hearing. This colorful affair, conducted on May 15, 1996, featured lengthy and plaintive testimony by the baiters and a thorough roasting of the agents by committee chairman Don Young and Congressman (as she insists on being called) Helen Chenoweth (R-ID). Chenoweth implied that the agents

had faked evidence and declared that "federal agencies are trampling over the rights of humans."

Young, the baiters, and George Reiger, conservation editor for *Field and Stream* magazine, told the committee that if the agents had really cared about wildlife, they would have stopped the hunt before it began. Particularly memorable was the exchange between Sheriff Oelrich and staunch MBTA defender Representative George Miller (D-CA). When Miller inquired if the sheriff's department made a general practice of stopping crimes before they begin, Oelrich allowed that it did.

Miller: It you know someone is going to buy drugs on the street corner, you go to the purchaser and say, "Do not do that, because that is illegal? . . . Is it policy, that, to prevent crime from taking place, you interrupt crimes in progress?"

Oelrich: "Yes."

Miller: " . . . So you do not watch people buy drugs and then arrest the purchaser and the seller? Your department does not do these things?"

Oelrich: "Oh, yes, we do that as well."

The antibaiting regulation, proclaimed Young, "is a bad law; it has to be changed." A "handicapped" person who "cannot see" the bait could get cited, he observed. "That is why we are going to change the law." When Bob Streeter, the Fish and Wildlife Service's assistant director for refuges and wildlife, opined that for safety reasons the blind should not hunt, the Congressman accused him of being "against the handicapped."

Gradually, from my collection of documents and interviews, a less heartrending account of what really happened at "Little Ruby Ridge" emerged. A dozen officers had proved too few, because when they showed up most of the suspects ran from the field. "It was pandemonium," recalls Special Agent Joe Oliveros. "People were running around honking horns and yelling, 'Get out, the game wardens are here.'" There was heavy drinking before and during the hunt. Bag limits were being exceeded everywhere, and protected nongame birds were dropping from the sky along with the doves. From Fish and Wildlife Service photos it appears that the participants had been wading through a silo full of cracked corn, kernel corn, millet, wheat, milo, and Bahia seed.

"Show us the bait," the hunters kept demanding. According to Fish and Wildlife Service reports, the agents said, "Look down, you're standing in it." Or: "We'll be glad to show you as soon as we finish writing tickets." Not one participant stuck around to see the bait, but at the hearing they testified that the agents refused to show it to them. Oliveros calls it one of the most flagrant baiting cases" he has worked on in 24 years of enforcing the MBTA and "a prime example" of what bait does to birds. "Doves, and I mean constant flights, were pouring into this field with 150 guns being shot," he says.

According to Fish and Wildlife Service documents, any guest at Senator Williams's dove shooting bash who didn't know the field was baited had to have been as visually impaired as the blind hunters championed by Don Young. But the antibaiting regulation for waterfowl is different than for doves. In 1972 the dove-baiting rules were relaxed to allow hunters to apply bait to a field by planting grain and then cutting the ripe seed heads. With ducks and geese, which are much less prolific than doves, hunters can grow all the bait they want, even flood it. But if they cut or manipulate the plants, they must do so before the seeds form or make sure there are no seeds on the ground or water for 10 days before hunting. I have never had the slightest trouble understanding this, but some of my fellow outdoor writers approach it as if it were the theory of relativity.

"Baiting laws are ambiguous," wrote Garvey Winegar of the *Richmond Times Dispatch* in a September 15, 1996, expose of "overzealous tactics" by Fish and Wildlife Service agents "An acquaintance was charged with baiting when someone far above hunt on a creek threw corn in the water. The corn eventually floated by my friend, who was unlucky enough to have a Federal law enforcement officer walk up just as the kernels floated by." But when I contacted Mr. Winegar for more details about this shocking incident, he couldn't remember when or where it had occurred. Nor could he remember the name of his "friend." In fact, he wasn't even sure where he had heard the tale. "Probably in a duck blind," he allowed.

Another ugly episode has been widely publicized by Randy Vogel, director and founder of the "Sportsmen's Defense Fund" which seeks carefully written "examples of overzealous law enforcement activities" along with money for the legal defense of federally abused hunters. On September 30, 1994, Federal agents on routine patrol near Browning, Illinois, noticed that the Long Lake Hunt Club had planted millet to attract waterfowl. Nothing wrong with that. But some of the millet appeared to be cut. The Feds took some photos and had a chat with game wardens of the Illinois Department of Natural Resources (DNR). When the state wardens made a routine inspection on October 24, they found the millet fields mown and the hunting

area awash with millet seeds. This might or might not have attracted significantly more ducks than if the seeds were still attached to the living plants. But if hunters were allowed to shoot over cut seed plants, they could keep adding seeds to the field; and if they were careful, the Fish and Wildlife Service would never be the wiser. Dove poachers do it all the time.

So the state wardens and two Federal agents staked out the place, and when club members went hunting on the season's October 27 opener, the wardens pinched them for shooting over bait.

One of the members cited was Randy Vogel. According to court documents, Vogel told the officers that he'd take care of the whole matter with just one phone call—apparently to his hunting buddy, Department of Natural Resources director—Brent Manning. After the officers had left, the captain got a call on his car phone from Manning's law-enforcement chief, ordering the team to return to the club and see if this whole thing wasn't just a big misunderstanding. It was not, reported the captain after the second inspection. Vogel and his associates were fined, and the Seventh Circuit Court of Appeals upheld the decision.

But Manning and Vogel did not quit the fight. They spoke out everywhere about the Feds' end their unfair antibaiting regulation. Manning toured the country, whooping it up for bait regulation "reform." In Memphis he addressed the International Waterfowl Symposium. In Tulsa, the North American Wildlife Conference. According to Manning, reported the Chicago Tribune, "untold numbers [of plant-cutting waterfowlers] have gotten into legal trouble simply by doing what they thought was right." (The Fish and Wildlife Service says these have been about 10 such plant cutters prosecuted in the United States during the past 20 years.) Ducks Unlimited quickly fell in step, issuing a statement that any manipulation of non-agricultural plant species should be made legal, whether or not they are bearing seed.

Manning and Vogel offered more testimony against the antibaiting regulation at the House Resources Committee's May 15, 1996, dog and pony show. So much noise did Manning make that the International Association of Fish and Wildlife Agencies selected him as chairman of its Ad Hoc Committee on baiting. The Fish and Wildlife Service had requested a review only of moist-soil-plant management for ducks and geese, but Manning's committee has taken it upon itself to recommend not only that law-enforcement personnel be assigned mind-reading responsibilities (that is, to determine intent to bait) but that waterfowl hunts be allowed over all cut "natural plants," and even, in some circumstances, millet (which has no agricultural purpose other than as birdseed). Manning says his committee will even look at the bait regulation as it applies to doves.

"What's to look at with doves?" asks Dave Hall, who retired from the Fish and Wildlife Service in 1994 after 34 years with its enforcement division and who now serves the Ad Hoc Committee as a technical adviser. "There's nothing a dove hunter can't legally do when it comes to cutting or manipulating ripe [food] plants. The only change they can make for doves is write a law that says you can dump bait out of a sack."

To understand the politics of bait fully, it is necessary to place the current "reform" initiative in its proper historical perspective. Identical initiatives motivated by identical appetites have consistently been launched since baiting was outlawed in 1935. The most recent battle occurred in 1988 along the Pacific Flyway, when the Fish and Wildlife Service reignited passions by suggesting cancellation of the special baiting permission it had granted to California in settlement of a suit brought by the state on behalf of its wealthy duck clubs. When Audubon sent me to the Salton Sea to report on the fracas, the executive secretary of the state Fish and Game Commission told me that without "feeding," all the ducks in California would fly to Mexico for the winter. (That is, they would do what ducks everywhere in the Northern Hemisphere do each autumn, fly south.) I had to agree. With the help of legitimate duck hunters and the National Audubon Society, the Fish and Wildlife Service won. So did the ducks.

Four years earlier, when Don Perkuchin took over as manager of the Blackwater National Wildlife Refuge, in Maryland, the baiters had the place surrounded. They were sucking ducks out of the refuge; so Perkuchin started passing out tickets like a conductor on a rush-hour commuter train. The baiters, especially the politicians from Washington, DC, didn't like getting busted. When they told Fish and Wildlife Service director Frank Dunkle to call off the duck cops, he meekly obeyed, ordering the Blackwater staff to stay inside the refuge and literally "disappearing" Perkuchin to Okefenokee.

In 1972 Federal agents Fred Williams, Willie Parker, and Dave Hall were called before Congress to testify about rampant baiting. After telling the truth—i.e., that the agency was failing in its duty to protect migratory birds—Parker and Hall were



transferred; Williams, demoted. But Congress and conservationists rallied to their defense. Eventually, the ducks won.

The baiting war that was going to end all baiting wars got under way in 1951, when Federal agent Fred Jacobson moved into the Lake Erie marshes like Eliot Ness into the South Side of Chicago. So undone was the Ohio Wildlife Council that it convened an emergency session to legalize baiting (at least under state law). The chairman of Ohio's Natural Resources Commission promised to fight the "unconstitutional" Migratory Bird Treaty Act all the way to the Supreme Court. "We're not baiting," he explained. "We're feeding." After Jacobson busted a hunting buddy of U.S. Senator John Bricker (R-OH), Bricker introduced "reform" legislation that would have overridden the president's power to make treaties such as the one that spawned the MBTA. Through it all the Fish and Wildlife Service stood tall. Finally, director Al Day was given the choice of calling Jacobson off the baiters or getting fired. He chose the latter.

Jacobson knew the ducks had won in 1954. When a hunter announced he couldn't afford to keep his marsh now that he was scared to bait it. That season the hunter had shot only 263 ducks. "How many do you usually kill?" Jacobson asked.

"Between 300 and 500."

"How big is your marsh?"

"About three-fourths of an acre."

Jacobson says he doesn't know who will win the 1997 battle. But Vernon Ricker, the soon-to-retire agent responsible for the Eastern Shore of the Chesapeake Bay, doesn't think that it will be the birds.

"I've enforced the MBTA for 28 years," he told me. "And I can tell you the Fish and Wildlife Service was going to go with the flow. It will cave in on anything. If it cared about the resource, we would have people here on the Eastern Shore to enforce the law." Maybe Ricker has a point; under pressure from big-shot baiters, the agency has reduced the number of agents patrolling the area from 12 to 1.

Always the bastard child of the Fish and Wildlife Service, the Division of Law Enforcement is constantly nagged to be more "preventive," more "customer friendly." But maybe it's time for the Fish and Wildlife Service to have a long think about who its customers really are. They are the 50 million Americans who enjoy watching migratory birds. And they are the 3 million Americans who enjoy hunting migratory birds without bait—who take the time to read water, wind, and law, who can work a circling drake pintail with a call, coaxing him down out of an icy autumn dawn; who train dogs; who have learned how to build a blind and position a decoy set; who have always believed that there can't be any thrill to the chase if there is no chase.

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#### SITTING DUCKS: THE U.S. FISH & WILDLIFE SERVICE'S ASSAULT ON THE MIGRATORY BIRD TREATY ACT

JUNE 1998

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources.

PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. Organize a strong base of support among employees with local, state and Federal resource management agencies;
2. Monitor land management and environmental protection agencies;
3. Inform policymakers and the public about substantive issues of concern to PEER members; and
4. Defend and strengthen the legal rights of public employees who speak out about issues of environmental management.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

## ABOUT THIS REPORT

This PEER white paper documents the retreat of the U.S. Fish and Wildlife Service (USFWS) from strong and uncompromised enforcement of the Migratory Bird Treaty Act (MBTA). According to its own enforcement personnel, the agency is bowing to intense political pressure to allow unethical hunting techniques, principally baiting, which will facilitate detrimental over-harvesting of game birds.

This report was prepared by USFWS law enforcement officers charged with the difficult duty of enforcing hunting regulations on the millions of sportsmen who participate in the taking of game birds during the annual hunting season. These special agents—who collectively have more than 500 years of wildlife law enforcement—are forced to remain anonymous not only to avoid repeated threats of retaliation from politicians and their own agency, but also to let the facts contained herein speak for themselves.

Information relating to particular cases discussed in this white paper was obtained through published media coverage and other public sources.

While critical of baiting, this report is by no means a critique of the practice of sport hunting. Many of the authors of this report hunt, but are outraged by what they see as hunting which contradicts the principles of fair chase and damages the very resources whose survival makes recreational hunting possible.

On behalf of special agents, PEER has also submitted to USFWS, as part of the public comment process, a detailed analysis opposing specific elements of the proposed rule change. A copy of the PEER comments is available upon request.

For more information about out how the agency's regulatory proposal would weaken the anti-baiting provisions, consult the Federal Wildlife Officers Association website at <http://www.nauticom.net/www/harts/fwoa/fwoahome.htm>

PEER is proud to serve conscientious public employees who have dedicated their careers to the faithful execution of the laws that protect our natural resources.

JEFFREY RUCH,  
*PEER Executive Director.*

## I. EXECUTIVE SUMMARY

At a time when migratory bird populations are stressed by habitat loss, pollution and hunting, the Department of Interior's Fish and Wildlife Service (USFWS)—the Federal agency mandated to conserve America's wild fowl—is proposing changes to liberalize restrictions against the use of bait to attract waterfowl. According to its own law enforcement personnel, USFWS has succumbed to mounting political pressure to loosen the Federal baiting prohibition.

Baiting is the illegal practice of using feed to attract game. It is a highly effective way to lure birds within a hunter's range of fire because feeding birds conditions them to return to a specific area time and time again. In this regard, a baited area is essentially no different than a bird feeder. Law enforcement officers and ethical hunters agree that this activity, which has been outlawed since 1935, violates the tradition and sporting heritage of hunting.

Despite more than six decades of enforcement, baiting remains one of the most common hunting violations. Baiting usually occurs in conjunction with other illegal hunting practices, such as exceeding kill or "bags limits. Due to the vulnerability of migratory birds to the lure of bait, large-scale baiting usually results in the slaughter of hundreds of birds in a short period of time.

Enforcement of anti-baiting laws has significantly reduced the unsustainable taking of game birds, but other factors continue to place pressure on bird populations. As habitat continues to decline in both quality and quantity, migratory birds are forced to concentrate into an ever-shrinking area, making them easier targets for hunters. For instance, North America's duck population, which has declined by 60 percent since the 1950's, is being decimated by hunters, many of whom use bait. The reason is evident—ducks are more scarce and baiting assures kills. The same is true for other migratory game species, including geese, swans and doves.

USFWS special agents, empowered to strictly enforce hunting laws, fear proposed changes that would hinder prosecution of hunters who shoot birds over bait and, as a result, drastically reduce game bird populations, undermining the intent of species protection laws. The officers question the motives of those and particularly their own agency—in favor of allowing the use of bait to hunt game birds. Like most Americans, the agents disagree with any government policy that promotes the use and abuse of migratory birds in a manner that has been banned for more than six decades.

Each year, the nation's approximately 200 USFWS law enforcement officers issue hundreds of citations for violating hunting laws, many for baiting. Many of these flagrant cases involve prominent individuals who use bait to ensure kills and often shoot more birds than the law allows. Despite their efforts, these few Federal agents cannot possibly ensure total compliance among the nation's more than 20 million hunters. Their job would be made more difficult if the USFWS weakens existing regulations.

The powerful sportsmen lobby and its state and Federal political supporters are pressuring the agency to change existing standards. State game agencies and hunter constituency groups want to relax baiting regulations that they claim hurt the average hunter. The proposed changes discriminate in favor of commercial interests—namely private hunt clubs which cater to wealthy and influential members—who want to enhance their hunting through baiting. Since birds would no doubt flock to the clubs' many acres of prime, heavily manipulated habitat, the common hunter would no longer have an equal chance to compete for limited waterfowl resources.

Congressional legislation has also been introduced to relax regulations by making it more difficult to punish hunting violators who fail to understand baiting laws. Most offenders are indeed victims of ignorance. They failed to learn the cardinal rule of Federal game laws—the hunter is always responsible when it comes to hunting over baited areas. If passed into law, the bill would, among other things, shift the burden of proof from hunters to law enforcement, making it more difficult to prosecute violators; eliminate the incentive to comply with regulations; and put migratory birds at greater risk.

In light of these issues, USFWS agents are baffled by their agency's recent, inexplicable turnaround on the issue. In May 1997, USFWS Assistant Director Robert Streeter testified before Congress against proposals to loosen MBTA provisions, arguing that such measures would "liberalize bird baiting laws and result in more birds being killed as a result of baiting" and possibly "result in overharvest of . . . waterfowl."

On the issue of hunter equity, Streeter warned that "liberalization. . . could promote and encourage an inequity whereby those with the greatest financial motivation and resources, such as. . . hunting clubs and commercial hunting operations, would benefit the most at the expense of the wildlife resource and the common hunter." In terms of the impact on the sport of hunting, Streeter said the loosening of regulations amounted "to the elimination of the traditional 'fair chase' hunting standard", providing "the anti-hunting segment of society a new platform to pursue for closure of all hunting activities."

Now, just one year later, there seems to be widespread complicity and cooperation on the part of the USFWS to deregulate antibaiting regulations.

Given the agency's new position, it is not surprising that in January, 1998 a USFWS employee was caught illegally hunting swan at a Virginia farm that had been the scene of repeated illegal baiting activity. The violator, Mr. Ronald Kokel—a wildlife biologist with the Office of Migratory Bird Management—was deeply involved in formulating the agency's proposed rule change regarding baiting.

In the opinion of USFWS special agents, both the agency's proposed regulatory changes and pending legislation endorse politics at the expense of conservation, riddling the regulations with loopholes that will render them unenforceable. By eliminating proven deterrents, baiting relaxation would increase enforcement costs at the expense of the too few officers in the field. The net effect would be a drastic reduction in game bird populations.

## II. WORLD OF BAITING

As post-industrial values continue to gain ascendancy in rural areas of the United States, increasing amounts of criticism of the poacher and his fading culture are sure to follow. This criticism eventually will find its way into the vocabularies and motives of the game wardens who have acted as a cultural buffer between poachers caught between the norms of society and survival and the encroaching modern world.—CRAIG FORSYTH, *The Game of Poaching*.

The Migratory Bird Treaty Act (MBTA) has been the principal statute protecting migratory birds in the United States for 80 years. Enacted to save birds "from indiscriminate slaughter," the law makes it illegal To hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sales more than 800 avian species. The MBTA does, however, permit hunting of migratory birds such as ducks, geese, swans, doves and others, subject to Federal regulations. The "taking" of game birds for sport occurs yearly during fall and winter hunting seasons.

Perhaps the most important of the MBTA regulations, in terms of preventing dramatic population declines, are those governing baiting. Baiting is the practice of illegally using grain, seed or other substances to attract birds to a hunt. This practice has been outlawed since 1935. And for good reason—ducks, doves and many other migratory birds are notoriously easy to attract to bait.

This inherent vulnerability means that once exposed to sufficient quantities of salt, rice, grain, or other substances, the birds lose their natural wariness and return repeatedly to the food, whether or not they are being shot at by hunters. The need to prohibit hunting over bait was demonstrated quite clearly in a well-known study conducted in the early 1940's which found that kill levels dropped from 1 million birds to 175,000 when bait was eliminated.

#### *Law of the Land*

Current rules regarding baiting are based on time-honored, court-tested principles which are straightforward and simple to understand. Federal regulations (CFR 50, Part 20) specify that No person shall take migratory game birds by the aid of baiting or on or over any baited area. Baiting is defined as The placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, or salt or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them. In other words, baiting occurs when food is spread or placed in the open or in water in order to lure migratory game birds, usually ducks or doves.

It follows then that a baited area is any area where the food is placed and where hunters are attempting to take—shoot, possess, kill—the targeted birds. The present regulations further state that the area where bait is spread is considered off-limits to hunting for a set period following complete removal of the bait. All grain or feed must be completely gone from the area for 10 days before the area can be legally hunted. The 10-Day Rule is essential because the birds habitually return to the same spot for several days after their food supply no longer exists. Some hunters refer to birds exposed to bait as “drugged or Daffy ducks,” so blinded by the quest for food that these wild creatures ignore instinct by acting almost tame.

All of the crimes under the MBTA are classified as misdemeanors or petty offenses, carrying a maximum \$5,000 fine. There is a possibility of jail time and loss of license for repeat offenders.

#### *Legal practices*

There is a difference between an illegally baited field and one which has legally been prepared with seeds for a legitimate purpose, such as farming or wildlife management. Both may contain food for birds, the difference basically being how and why it is there.

Federal regulations recognize that agricultural lands afford good migratory bird hunting. Birds are predictable and prefer farm land where crops have been harvested, providing them with their preferred food source—seeds. It is perfectly legal, for instance, to hunt waterfowl over areas where normal crop planting and harvesting have occurred. Likewise, it is permissible to hunt doves over an area where scattered grain is present solely due to a “bona fide” agricultural operation or where standing crops have been manipulated—cut, mowed, dragged down, bush-hogged, dished or burned—for wildlife management purposes.

Planting crops or creating habitat which attracts game is permissible; indeed, wildlife agencies will actually help. But spreading the seed to attract the birds is forbidden. The general theory is that planting the crops has a long-term benefit for wildlife because the scattered seed is there before and after the hunting. That type of planting is thought to benefit wildlife other than the game birds.

The mistake too many landowners make is instead of preparing their crops earlier in the year for hunting season, they wait until a few days before the season starts to top-sow wheat, for instance. The only purpose for spreading seeds around generally at that time of year is to guarantee bird kills.

#### *Legal Agricultural Hunting Areas*

- Standing crops: fields of unharvested commercial crops such as wheat, corn, sorghum or mile.
- Flooded crops: crops that are grown, led standing and flooded.
- Aquatic plants: plants which live and grow in water.
- Flooded harvested crops: flooded crops where grain is present solely as a result of a normal harvest.
- Shocked grain crops: stacking stalks of grain upright on the same field where they were grown.

- Normally planted crops: planting must be done in a way where normal methods are used to produce a crop (does not include top-seeding or the placement of grain in piles or other large concentrations).
- Harvested crops: normal harvest scatters grain over a wide area, rarely in long rows or piles.

#### *Too Close for Comfort*

Many hunters wonder, “how close can I be to bait without breaking the law?” There is no set distance. Court rulings on baiting violations state that the distance between the hunter and the bait varies. The influence of bait can extend or shrink on the basis of many factors, including the topography or landscape of the area, the weather, and bird flight patterns. The question of distance is decided on a case-by-case basis. Regardless, agents estimate that the number of truly unaware hunters cited for illegal baiting represents an infinitesimal number of cases.

In those rare situations, the hunter could probably have avoided trouble by taking preventative steps to avoid hunting in a baited area:

- Ask before hunting. It is the hunter’s responsibility to talk to the host or property owner to find out what was done to the field and when. Some landowners may try to manipulate the rules by placing food out continuously through the summer, stopping 2 weeks before hunting season. Regardless, anyone who hunts over an illegally prepared field is subject to the baiting law.
- Look before hunting. Simply asking his it legally and then hunting is not enough. Neither is a cursory examination of the first few yards in front of a shooting vantage. Hunters must make a vigorous visual inspection of the field. This involves arriving early enough to walk the field, preferably in a zig-zag pattern from one end to the other, looking for signs of baiting. Grain for legitimate crops are always evenly distributed, not clumped or broadcast. Piles or rows of grain and seed recently turned under the topsoil are not part of normal planting or harvesting or the result of a bona fide agricultural practice.
- Use logic before hunting. A hunter should consider why birds would be attracted to the area. If the field recently has been plowed and is nothing but rows of mud, something obviously is wrong. Birds are not attracted to bare dirt or tall green plants. They seek seeds and grains. If there is any doubt that a field the hunter plans to hunt may be illegal, it is not worth the risk to hunt.

#### *Strict Liability*

Federal wildlife officers live by a simple credo—the regulations regarding baiting are clear and the law will be enforced. The hunter is ultimately responsible for his actions and should make an effort to assure his area is bait-free. Tried and tested for more than half a century in state and Federal courts, baiting laws come under the legal principle of “strict liability”—that is, judges do not require the prosecution to prove the hunter had prior knowledge of baiting. All they have to prove is the defendant was hunting over bait. So as soon as he attempts to hunt over a baited field, the hunter has technically broken the law, and can be prosecuted.

In establishing this precedent, the courts clearly place the responsibility on the hunter, regardless of who owns the field or who actually prepared it. Law enforcement officers agree strongly with this rationale because there is no practical alternative to this approach to enforcement.

#### *Tricks of the Trade*

Before shooting, hunters should look for any signs of seed, grain, salt or anything else not attached to natural vegetation growing in the field. If something seems suspicious, hunting is not worth the risk. Some sure baiting giveaways even “city slickers” can notice:

- Birds flocking to a field without any crops or plants. Doves and ducks do not eat dirt. Birds attracted to a seemingly barren field are a sign the owner probably had bait out and plowed it under a day or two before the season—an illegal act.
- The heavy presence of seeds in the dirt on a field growing a crop. One baiting trick is to spread grain and seed after the crop has started to come up. Agents usually spot it quickly. So should hunters.
- Birds flocking to an adjacent field in inordinate numbers. Shooting birds attracted by bait is against the law—whether the bait is on the field the hunter is sitting on, or one next to it.

Omitting or relaxing strict liability in any way would cripple the MBTA regulations and lead to a host of problems. For instance, officers would have to catch people in the act of baiting to make a solid case. In order to do this, they would require expensive, high-tech equipment like helicopters to enforce the regulations. Also, many more agents would be needed in the field to conduct sting operations and in-

vestigations, particularly since even more of the agents' time would have to be spent in the office developing cases.

Realistically, if an agent had to keep a field under surveillance 24 hours a day, 365 days a year, and also read a hunter's mind, there would never be a conviction. Without convictions there is no deterrent, and the law is rendered meaningless.

#### *Off the Hook*

The concept of strict liability is common among environmental statutes such as oil spill and toxic pollution laws. Not only is strict liability central to the MBTA, this standard also extends even to non-hunting violations, providing leverage over individuals, and particularly industries, to take steps to avoid killing birds. Replacing strict liability with a "scienter" standard—requiring agents to prove prior knowledge of or intent to violate—would create so many avenues of "reasonable doubt" that convictions would be few and far between. Examples of potentially valid excuses without strict liability:

- a hunter who shoots a Western Kingbird—"I thought it was a dove."
- an oil company whose open oil pit kills geese—"We didn't realize it posed a danger."
- a mining company using cyanide leach—"We never intended to kill any birds."
- a farmer using harmful pesticides—"I couldn't help that ducks fed on the field."
- a person who poisons swans—"I only meant to kill starlings."
- a seller of Indian artifacts—"I had no idea they were eagle feathers."

Finally, agents worry that the need to prove the hunter's knowledge or intent would result not only in more case dismissals but also more lawsuits against wildlife officers themselves for false arrest. Even under the current regulations, commercial hunting operators have tried to sue officers for economic damages resulting from "closure" of a club or the bad publicity surrounding an arrest. Many of the well-connected hunters would not hesitate to sue agents as a bullying tactic or for revenge. Even though many of these suits would be defended by the government on the agent's behalf, the uncertainty and stress inherent in this type of litigation are not welcomed by overworked law enforcement officers.

#### *Ducks Not So Unlimited*

The most hunted and the most harvested migratory game bird in North America is the mourning dove, of which 45 million of the estimated 500 million population are killed annually in the United States during hunting season. Waterfowl is also a highly prized game bird. So much so that over the last five decades, North America's duck population has declined by 60 percent.

Migratory birds face many pressures in this country, not the least of which is habitat loss. The Mississippi Flyway, the area running the length of the country's mid-section, is suffering the loss of thousands of acres of habitat annually. Originally, the Mississippi Alluvial Plain comprised nearly 24 million acres of bottomland forested wetlands. By 1937, only 11.8 million acres (50 percent) of these remained. Today, there are less than 5.2 million acres left, roughly 20 percent of the original acreage.

The Mississippi's bottomland hardwood forests are among nation's most important wetlands, serving as primary winter breeding ground for many waterfowl, including 85 percent of the 3 million mallards (among the species hardest hit), nearly all of the 4 million wood ducks, and countless other migratory birds. Since the 1950's, these forested wetlands have been converted for crop production, drained for Federal flood control and navigation projects and cleared for other development at an accelerated rate. An estimated 2 percent of remaining bottomland forests are lost annually.

Each year hundreds of miles of coastal marshes also disappear, primarily due to erosion. Without the constant infusion of fresh water from rivers, the marshes subside, and are virtually defenseless against the Gulf of Mexico's ever-pressing salt-water. Indeed, the freshwater marshes that once lay before the Gulf, teeming with healthy and abundant fisheries, have largely vanished. In their place are vast expanses of brackish and salt water.

#### *Baiting's Impact on Wildlife*

As habitat continues to decline in both quantity and quality, the dwindling waterfowl population is forced to concentrate into an ever-shrinking area, making the birds easier targets for natural predators and hunters alike. Even with continental duck populations dropping faster than habitat is being destroyed, the USFWS, along with many sportsmen and conservation groups continue to ignore the impact of hunting on the resource. As a result, North America's battered ducks are being decimated by hunters, many of whom hunt over bait.

When asked why he illegally baited, a convicted hunter replied: "You have to if you want to get ducks these days." The reason is simple: Ducks are more scarce and baiting assures kills. Repeatedly told by the USFWS and groups like Ducks Unlimited that "hunting is compensatory," "hunting has no impact," it is little wonder many conclude that cheating a little to ensure a day's kill is not really a big deal.

Agents contend and studies confirm that baiting is usually associated with other hunting violations. According to a survey conducted during the 1986-90 hunting seasons by wildlife experts at Mississippi State University, 36 percent of all Mississippi Flyway waterfowl hunters admitted committing one or more violations. The southern region of the Flyway—Arkansas, Mississippi, Tennessee and Louisiana—consistently had the greatest percentage of violators. For example, Federal law enforcement officers estimate that illegal waterfowl hunting in Texas and Louisiana exceeds by four times the annual legal kill.

Most guilty hunters surveyed said they broke laws intentionally, primarily those concerning baiting and bag limits. The fact that many hunters engage in unethical practices in the field suggests there is a continuing need for wildlife law enforcement. Indeed, in all states surveyed, violators and legal hunters thought increased law enforcement (particularly undercover operations), mandatory loss of hunting privileges, large fines and jail terms were the most effective deterrents to illegal hunting. As the scientists who designed the MSU survey suggest, "Unfortunately, there will always be a segment of the hunter population that must be regulated into lawful behavior."

If every hunter killed the bag limit every time out, overharvest would result. So what will it take to wake hunters up to the true cost of baiting in terms of the resource? Perhaps when the last duck flies over the marsh. "If that happens," warns one agent, "I just hope everyone doesn't rush to get their guns and shoot it."

### III. POACHER'S PARADISE

Nobody left me any buffalo to shoot. Why should I leave anyone any ducks?—LOUISIANA HUNTER

In March 1971, USFWS law enforcement officers stationed in Louisiana wrote a memorandum to their superiors in Atlanta and Washington, DC, describing the widespread waterfowl poaching problem. The memo details a 3-day period during a previous hunting season in which the officers made random spot checks wherever they observed duck hunters and concentrations of waterfowl. With the use of a helicopter they inspected a number of hunting parties and found frequent evidence of baiting.

According to the memo, the special agents "filled litters attached to each pontoon of the helicopter with seized ducks." They also filled the cockpit with "additional burlap bags of seized waterfowl. The large number of illegal duck kills forced the helicopter to return to the airport several times to off-load and dispose of the carcasses.

In a later foray, the officers inspected more than two dozen duck hunting clubs. As stated in their memo, "one hundred percent of these clubs produced evidence of baiting."

A standing joke in Louisiana is that if you wanted to control a bird's population, make the bag limit two and close the season. "We did wrong, we admit that," said Dennis Badeaux, a hunter found guilty of shooting more than 50 birds over a baited pond in a Louisiana bayou. "It's just that for so long, killing ducks like we did was the accepted practice down here. Nobody thought anything about it. We killed what we wanted to kill. . 200, maybe 300 [birds] a day. No big deal."

In some places, men are often judged by the number of birds they kill. Indeed, for many baiting is more than just a standard hunting practice—it is a way of life. Other hunting violators are "weekend warriors" from urban areas who are either too lazy or too pressed for time to sit in a blind all day and risk going home without a duck.

#### *Playing Catch*

Every year wildlife officers around the Nation issue thousands of citations for hunting violations. The lure of using bait to draw migratory birds into an open field of the hunters' choosing is a powerful one and has led to many flagrant cases. The following are typical examples of what agents experience during the annual hunting season:

Earlier this year in Nebraska, former Minnesota Vikings football coach Bud Grant and members of his hunting party were caught baiting migratory birds during the filming of an outdoor television show. More than 100 pounds of corn were scattered among decoys in order to guarantee televised shooting action.

In 1996, a former Kentucky Governor, his son, a member of the board of education, two police officers and a mayor were among 36 prominent citizens cited for taking part in an illegal dove hunt. The traditional opening day paid event involved the use of sunflowers and top-sown wheat to attract birds to the farm.

In 1993, a Washington, DC lobbyist and 20 of his friends and clients slaughtered nearly 200 ducks in 45 minutes at a Chesapeake Bay area private hunt club.

At an opening weekend "charity shoot" in 1991, law enforcement officers busted 88 Louisiana hunters, many of them prominent businessmen, for baiting at a private hunt club. A team of state and Federal agents closed down the hunt because surveillance photographs revealed that piles of grain had been illegally placed on several fields a few days before the hunt and then "turned under" the surface the day before the opener. Many of the hunters had paid as much as \$80 each for the chance to take part in the event, billed by club operators as "the hottest dove action north of the border."

In another Louisiana joint state-Federal crackdown, a state game warden was among more than 50 people pinched for hunting doves over a heavily baited wheat field. Another 40 hunters were cited for baiting on the same day in a nearby parish.

In South Carolina, at a time when declining waterfowl populations forced a shortened hunting season and reduced the bag limit to two ducks per hunter, nine men were cited for killing 144 wood ducks. The hunters committed the violations in an area that had been set aside as a waterfowl sanctuary.

A few years ago in Virginia, two county judges and a retired State Police Captain were among a group of 50 hunters who bagged hundreds of doves over a wheat scattered farm field. That same season, 18 county lawyers, one a former Commonwealth's attorney, were nabbed using a "borrow pit"—a large, shallow hole filled with gravel, wheat and water—to kill doves as they descended to the trap. In another case, two men without valid duck "stamps" used 100 pounds of corn and live bait—two caged, honking Canada geese—to lure "some meat," as they later referred to the birds. The use of live bait was banned along with baiting in 1935. The hunters were prepared to shoot the incoming geese and ducks with outlawed semiautomatic shotguns capable of shooting five shots without re-loading (instead of the legal maximum of three shots).

In 1990, an Alabama lawyer, his father and two other men were charged with multiple hunting violations, including baiting. Using mile to attract hundreds of ducks to a pond, the hunters bagged 52 birds, including 46 mallards. Aside from taking 27 catches over the limit, nearly half of the ducks killed were hens, which were scarce that year. When the hunters noticed the agents, two tried to flee in boats but were tracked by a helicopter.

A sting operation in Texas netted \$250,000 in fines, 1,300 citations and criminal indictments against 200 hunters, their guide services and several "four star" hunt clubs for massive hunting violations. Over a ton of wheat was used as bait to ensure high "body counts." Hunters packed into blinds, hid until the birds settled on the water in large concentrations, and then fired en masse. With so many targets, there was no need to aim. One professional guide was charged with encouraging his clients to ignore bag limits and "just keep shooting." Hundreds of ducks, geese and non-game bird were killed in what the media later dubbed the "Texas Waterfowl Massacre."

#### *Spread Too Thin*

A "reformed" poacher in Maryland told officials that for 50 years he baited "two or three times a day" without ever getting caught. He estimated that he killed more than 30,000 ducks during his poaching career. Taking a look at enforcement numbers in this country, it's not surprising that hunters can avoid getting caught breaking the law given the obstacles officers face.

The ratio of hunters to wildlife officers is approximately 9,000 to 1. This means that there are only 7,000 state and Federal officers covering the entire nation, from Alaska to the Virgin islands, from Main to Guam, monitoring the activities of 20 million hunters. Year-round these officers enforce laws during hunting seasons for a variety of game species ranging from deer and bear to pheasant and quail. In addition to migratory bird laws, USFWS special agents nationwide are also charged with enforcing interstate wildlife transportation laws (the Lacey Act), the Endangered Species Act (ESA), the Airborne Hunting Act and all other Federal laws regulating wildlife, including fish.

Not surprisingly, these paltry few Federal law enforcement officers—roughly 200 special agents nationwide—are so underfunded and under-equipped that they can do little more than sit and watch as wildlife is gunned down. In Colorado, for example, where nearly two million hunting licenses are sold each year, there are three Federal field agents to cover the entire 104,000-square-mile state. Because of paper



work requirements and other competing demands, agents never get around to enforcing wildlife laws at all in some states. While poachers take animals year-round, agency funding restrictions keep most agents deskbound after waterfowl hunting season ends, making enforcement virtually non-existent for many months at a time.

The minimal Federal presence in some areas is more troublesome given that Federal law enforcement is comparatively free of certain political constraints that are a fact of life for state agents. Like their Federal counterparts, state agents are charged with enforcing waterfowl laws but their jobs oftentimes are vulnerable, especially when they nab the wrong person. Political interference often comes with the territory in some state game agencies, with some states more political than others. Indeed, a state game warden who pinches someone who knows a legislator or high official, might put his job in jeopardy, or at least find life more difficult in the field.

#### *Taking the Bait Out of Crime*

Despite the seemingly uphill fight agents face, enforcement can have an impact. For instance, things have changed dramatically in Louisiana in the last decade. Migratory birdbaiting cases, along with other hunting violations, have dropped precipitously in recent years.

Surveys made in the late 1980's show that Louisiana trailed only California and Texas in the number of hunting citations issued—not bad considering that a quarter of all waterfowl winter in Louisiana (ranking the state second only to California in that regard).

There are a variety of contributing factors to the state's sudden turn around. Nationwide negative publicity in the 1980's surrounding baiting and other hunting crimes embarrassed Louisiana into finally taking action. State game wardens then began assisting Federal law enforcement agents in actively pursuing violators.

Federal judges and magistrates began cracking down with tough penalties, often handing down jail time along with stiff fines. A former Louisiana Governor became so paranoid about being caught hunting over bait that he posted State Police officers on look-out to warn him if Federal law enforcement officers were spotted in the area.

In Virginia, after waterfowl violations dropped considerably over a 6-year period due to strong enforcement, some citizen members of the state game commission criticized Federal agents as "overzealous" in performing their duties. "If hunters are mad, we must be doing our jobs," commented one of the agents.

Statistics show that deterrence is working in Illinois, as well. Since 1993, as baiting fines have increased and more violators have lost hunting privileges, the number of citations have dropped dramatically, especially for baiting.

Thanks in large part to certain and consistent enforcement, hunters have begun to realize that baiting is a serious offense. And it is no longer acceptable, in Louisiana, Virginia, Illinois, or anywhere else in the country. At least for now.

#### IV. IN THE LINE OF FIRE

Always the bastard child of the Fish and Wildlife Service, the Division of Law Enforcement is constantly nagged to be more 'preventive', more 'customer friendly.' But maybe it's time for the Fish and Wildlife Service to have a long think about who it's customers really are. They are the 50 million Americans who enjoy watching migratory birds. And they are the 3 million Americans who enjoy hunting migratory birds without bait. . . who have always believed that there can't be any thrill to the chase if there is no chase.—TED WILLIAMS, *The Baiting Game*.

USFWS law enforcement officers have a reputation of incorruptibility in enforcing laws and regulations. This even-handedness has historically generated controversy when a person of influence gets caught.

#### *A Gramm of Prevention*

In the Fall of 1987, just before opening day of waterfowl season, two USFWS special agents flying a routine early morning patrol over the Eastern Shore of the Chesapeake Bay spotted huge piles of bait ringing a pond below. They immediately suspected that local hunters were illegally trying to lure ducks into shotgun range.

The area, located near the Blackwater National Wildlife Refuge, ranks among the country's most desirable locations for waterfowl hunting. Just a convenient 2-hour drive from the nation's capital, private hunt clubs abound to entertain rich and powerful clients. Sometimes, in the zeal to maximize their harvest during a stay, guests run afoul of game laws, usually by baiting.

The pond that caught the eye of the agents that day happened to be adjacent to a vacation home owned by U.S. Senator Phil Gramm (R-TX). A followup inspection revealed clear signs of active baiting, including several hundred pounds of feed and spent shotgun shells around a duck blind. But after 4 days of undercover surveil-

lance, no hunters showed up. Although Gramm denies it, a former Interior Department assistant secretary submitted sworn testimony to a congressional panel in 1989 that then USFWS Director Frank Dunkle, aware of the ongoing investigation, tipped off the Senator to avoid an “embarrassing situation for a politician Dunkle said was “useful to Interior.

The investigation soon fell apart amid a political firestorm generated by Gramm. An internal investigation into the episode found photographs of the baited duck blinds were mysteriously “lost” by the agency. As a result, the Senator’s friends who owned the pond were exonerated of wrongdoing.

The political fallout incited by Senator Gramm was swift and severe. After the inquiry, one of the agents was transferred. Gramm then met with Director Dunkle to complain on behalf of his neighbors—many of whom were his political contributors—about the local refuge manager’s aggressive crack-down on illegal baiting in the area. Gramm admitted telling Dunkle “that people all over the country are up in arms over this guy.”

After the meeting Dunkle told his deputy director that “the management of the [Blackwater] refuge would go better if they had a change in the head of operations down there.” When the deputy director and his regional supervisor disagreed, voicing strong support for the 32-year USFWS veteran, they were demoted. The first order of business for their successors was to oust the refuge manager.

Other changes followed. Dunkle ordered officers on the Eastern Shore to practice “preventative” law enforcement by notifying owners when bait was found on their land instead of issuing citations. He also restricted agents to the Blackwater’s boundaries—an order that did not apply to the nation’s more than 500 other refuges. Coincidentally, the number of special agents patrolling the more than 100 miles of shoreline has dropped from 12 to 2.

#### *States’ Rights and Wrongs*

Since their implementation in 1935, the MBTA regulations have been amended 18 times, the last time 25 years ago, in an effort to make them as clear as possible to hunters and to the agents charged with enforcing the law. Based on pressure exerted by a few politically powerful hunters, a 19th set of amendments is now under consideration. The reason is simple—hunters clamoring for more game to shoot, and who want to make the hunting experience easier, have set their sights on relaxing the regulations that prohibit baiting.

The proponents of regulatory change have found support among some state game and fish agencies, which have long been in conflict with the USFWS over baiting laws. Illinois provides a classic illustration of the states’ obstruction of Federal regulations.

In 1933, a report declared Illinois the most heavily baited state in the nation. To some extent, that tradition continues, although baiting techniques are no longer as blatant or as easy to detect. The new, more sophisticated methods used by hunters essentially achieve the same purpose as dumping seeds from a sack. Today, manipulating crops, supplementing or adding seeds, and employing dubious farming practices are the norm, providing a real challenge for wildlife officers.

As if these kinds of cases are not hard enough for Federal agents to deal with every day, their progress has been impeded by the Illinois Department of Natural Resources (DNR). In 1993, for instance, the DNR gave into pressure from hunters complaining about a lack of food for ducks. Just before the start of hunting season, in an effort to initiate a “green up” to draw birds, the agency conducted aerial wheat seeding on the water and around blinds.

When USFWS agents informed the DNR that allowing hunting in those areas would put hunters in jeopardy of violating the anti-baiting regulations, the state agency reluctantly agreed to postpone hunting until all seeds were removed from the area. When hunters complained, the DNR blamed “the feds” for imposing the restrictions.

A year later, state wildlife officers requested USFWS assistance in determining if a waterfowl management area had been improperly planted with millet and mowed prior to teal season. The special agents confirmed heavy amounts of seeds on the water around every blind site and observed ducks in a feeding frenzy, “like drug addicts on dope.” Despite DNR Director Brent Manning’s concern that closing the area would upset hunters, the evidence of an impending duck slaughter left no choice. The DNR issued a press release about the closure that was highly critical of the Federal agents’ “interpretation” of the regulations, sparking media outrage against the USFWS.

### *No Fear*

In September 1997, USFWS law enforcement officers documented widespread evidence of baiting at hunt clubs in the Suisun Marsh area of central California, wintering ground for 20 percent of North America's migratory waterfowl. The agents set up a meeting to alert the local Resource Management District to potential violations. The district's executive director angrily denounced the regulations, telling the agents to "get your ticket books," because his office did not intend to enforce certain baiting laws for the clubs. He also threatened the agents, informing them that "we're going to do everything we can to get your ass out of our area." Following the incident, the USFWS assistant regional director for law enforcement informed a California sportsmen group that hunters "should not fear prosecution during the 1997-98 season" for violating the controversial baiting restrictions.

In 1995, following the Enclosures controversy, Federal law enforcement officers on an aerial patrol along the Illinois river spotted possible hunting violations at a hunt club. State officers alerted to the site confirmed baiting activity—seeds floating among the duck blinds—and cited the club for illegally cutting and mowing millet.

One of the club members hunting that day, Randy Vogel, happened to be a close friend of DNR Director Manning. Vogel told the officers that he would "take care of [the problem] with one phone call" to his buddy Manning. In response to the call, Manning ordered a second site visit of the club just to be sure. The officers, accompanied by DNR's law enforcement chief, inspected the area and again concluded that it was baited.

Some of the hunters decided to fight the charges in court. After losing the case [*U.S. v. Hogan*, 906 F.Supp. 455 (1995)], the hunters appealed. This time, Manning even had a DNR waterfowl biologist testify against his own wildlife officers. The court ruled the case, "duck soup—misdemeanor convictions, only fines imposed, and a challenge on appeal only to the sufficiency of the evidence. . . . In short, there was sufficient evidence in this record to support a conviction, and the judgment is affirmed" [*U.S. v. Hogan*, 89 F.3d 403 (1996)]. In upholding the fines against the baiters—which ranged from \$100 to \$2,100—the court did not overlook the fact that Vogel attempted to involve Manning, and chastised the DNR director for misusing "the power of his position in an attempt to shield a friend."

### *A Free Lunch*

In January 1997, at a southern Illinois hunt club—with a history of hunting violations—wildlife officers observed thousands of geese flying in and out of a baited field, while as many as 50 hunters shot and killed the birds. Officers advised the club owner that manipulating corn was illegal and that the area would remain a baited area until 10 days after the corn was removed. No individual hunters were charged and no geese were seized from any hunters.

In addition to initiating congressional inquiries, the club filed an injunction the next day to continue the hunt. Neither the wildlife agencies nor the U.S. Attorney pursued the baiting charges. The hunt club also filed a lawsuit against one of the DNR officers for \$100,000, citing lost revenue for being prohibited from hunting the baited area for 2 days. Despite the fact that his agency has been named in the pending lawsuit, DNR Director Manning recently coordinated and attended a Republican lunch and geese shoot fundraiser for a gubernatorial candidate at the same club.

### *Seeding Discontent*

After the case, both men took their fight to the public. Vogel founded the Sportsmen's Defense Fund and in his newsletter urged people to contribute stories of "overzealous law enforcement activities" in order "to convince Congress that some meaningful changes in our fish and wildlife laws are desperately needed." He also began raising money for the legal defense of federally abused hunters.

Agreeing with his friend that hapless hunters are too often the victims of unreasonable Federal regulations, Manning launched a one-man crusade to stir up opposition to baiting laws. He traveled the country speaking to state game and fish departments and sportsmen groups, urging widespread regulatory "reform" under the rally cry of consistency, clarity and common sense.

At about the same time, a number of state game directors asked the International Association of Fish and Wildlife Agencies (IAFWA) to press the USFWS for baiting law "reform." At the association's annual convention, after Manning pledged to spearhead a campaign to change the regulations, the IAFWA tapped him to serve as chair of the newly created Ad Hoc Committee on Baiting.

No conservation groups were asked to participate on the Committee, which is laden with Manning's DNR staffers (9 of 29 members). In February 1997, the IAFWA faxed the committee's draft baiting recommendations to all state game directors for comment. Only 15 states responded, with 6 rejecting either all or key

portions of the proposed changes—not exactly a groundswell of opposition to the current regulations.

#### *Ducking the Rules*

Nevertheless, the IAFWA adopted the Ad Hoc Committee's final recommendations and submitted them to the USFWS last year. Their proposal is twofold. One part deals with moist-soil management, with the association insisting that the manipulation of non-agricultural vegetation planted specifically to attract waterfowl to a hunt should not be considered baiting. Under the guise of wildlife management, they are essentially advocating the use of "natural, wild plants, instead of piles of corn or wheat or grain, as bait. Tweaking the regulations in this way would produce the same results—birds will come in droves and be shot.

The IAFWA argues that baiting regulations are too confusing or inconsistently applied, causing innocent hunters to be ensnared. To address this "problem," they also favor the removal of "strict liability," the more than half-century old standard by which hunters can be cited for baiting without any knowledge or intent to do so. Under the association's amendment to the regulation, law enforcement officers would face the nearly impossible task of proving that a violator "knows or through the exercise of reasonable diligence should have known" that the area was baited.

The IAFWA is essentially urging the USFWS to make a legitimate excuse out of ignorance, as virtually every violator apprehended claims not to have known about the presence of bait. Powerful Members of Congress, subscribing to this "ignorance is bliss" argument, are pushing for similar regulatory relaxation on behalf of their constituents.

#### *Little Ruby Ridge*

The first day of hunting season is when most baiting occurs, serving as a festive occasion for hunters to get reacquainted with one another and to make plans for later hunting excursions. One reason for baiting fields on opening day is that no one wants their first party of the season to flop, especially if it's a pay hunt with the added pressure to guarantee birds. To avoid this problem, illegal baiting sometimes takes place.

A high-profile opening day baiting bust in 1995 triggered a new wave of Congressional attacks on Federal regulations, leading to intense legislative scrutiny and an attempt to weaken the law. On that October day, USFWS special agents raided the second annual "Predators Dove Hunt"—a charity dove shoot and beer blast—in Dixie County, Florida. Officers found illegal bait everywhere and saw doves settling down in the fields despite all the blasting guns. As soon as the agents arrived to break up the hunt, most of the 150 hunters fled.

Agents seized nearly 500 bird carcasses, many of them non-game birds. In all, 86 hunters were cited for baiting and bag limit violations, and later paid nearly \$40,000 in fines. One of the agents called it the most flagrant baiting cases he'd worked in 24 years and a prime example of what bait does to birds. "It was a complete war," he said. "Very effective baiting."

Present at the Dixie County "hunt" that day were four Florida sheriffs, the regional director of the Florida Game and Fresh Water Fish Commission, state wildlife officers and a host of local politicians. These individuals contacted their Congressmen and so began a concerted effort to dismantle the baiting law.

Upon hearing of the "heavy hand" of Federal law enforcement agents, U.S. Representative Don Young (R-AK) introduced the Migratory Bird Treaty Reform Act to loosen baiting restrictions. As chairman of the House Committee on Resources, Young called a hearing and solicited testimony from angry hunters.

Not surprisingly, the episode was depicted as "a little Ruby Ridge" and the Federal agents involved were lambasted for "overzealousness" in enforcing the law. Even Brent Manning and Ron Vogel flew in to offer testimony on the need to "fix" baiting laws.

#### *With Friends Like These . . .*

As a result of the staged revolt of state agencies and hunter constituency groups, and driven more by politics than biology, in March 1996, the USFWS put a notice in The Federal Register soliciting comments on the agency's plan to reassess the MBTA regulations related to baiting. The agency invited the IAFWA to tell it how to "improve" the rules.

A group of USFWS special agents also took the time to review the baiting regulations, concluding that changes were not necessary. A number of them even wrote a scathing memo to their superiors in Washington charging that any liberalization of the baiting regulations "has nothing do with protection" and "everything to do with the enhancement of killing opportunities." Their protest fell on deaf ears.

The USFWS caved in to the threat of legislation by promising to address the baiting "problem" through the regulatory process. In May 1997, law enforcement officers were notified by headquarters to accept "politically certain givens," including the fact that "there will be a scienter standard applied to baiting." The agents were also told that other changes, relating to the IAFWA's concerns, were forthcoming.

On March 25, 1998 the axe fell. A week after providing the IAFWA with advance notice, the USFWS published in the Federal Register a proposed rule change to the current MBTA regulations. The agency's stated rationale was to provide "clarity for the public and consistency and fairness in law enforcement operations." In a press statement, USFWS Director Jamie Rappaport Clark admitted that the proposal is based on input from state fish and wildlife agencies and sportsmen groups. But she insisted that "no adverse effect on migratory bird populations" would result.

USFWS law enforcement officers wholeheartedly disagree with the director. While they support the proposal to ban hunting over topsown seeds, the agents insist that other proposed changes would weaken baiting restrictions, causing increased waterfowl mortality. Of particular concern to law enforcement officers are changes that would liberalize the regulations to allow hunting over areas that have been manipulated under the guise of "moist soil management practices."

Under the agency's proposed rule change, hunters or commercial hunt club operators would be permitted to grow, cut and then flood certain crops with mature seed heads. Allowing the mowing of vegetation with seed heads present serves no purpose other than to attract waterfowl, producing a legal loophole for hunters to enhance their "harvest" opportunities—in short, to kill more birds. Moist soil management practices for habitat conservation purposes are already allowed, the agents contend, and therefore this provision does not need to be changed.

Although the removal of the strict liability standard is not part of the USFWS's current proposal, if adopted, the agency's sweeping regulatory re-write will accomplish much of what Don Young and Brent Manning intended all along. Vernon Ricker, a retired Federal agent once responsible for the Eastern Shore of the Chesapeake Bay, is among many who are not optimistic that the agency will act in the best interest of the resource:

"I've enforced the MBTA for 28 years and I can tell you the USFWS is going to go with the flow. It will cave in on anything. If it cared about the resource, we would have people here in the Eastern Shore to enforce the law."

#### *The Young Bill*

Baiting restrictions have drawn heat from politicians primarily because some constituents have complained that they were invited to a hunt where they were unaware bait was being used. Under the law, a hunter can be convicted of the crime even if he did not know the field was baited.

This strict legal interpretation is necessary given that every person caught hunting over bait naturally claims to have had no idea the bait was there. Without strict liability, it would be much more difficult to prosecute violators.

In May 1997, Rep. Don Young introduced legislation to significantly weakened the MBTA regulations in a number of ways, most seriously by codifying the IAFWA's intent element. Supporting the measure were a small, vocal group of hunters, mainly paid professional guides, commercial hunt clubs and lobbyists for the sport hunting industry.

Young recently struck everything from his bill except the most threatening aspect, the scienter standard requiring proof beyond a reasonable doubt that a hunter had prior knowledge of baiting activity. In speaking to his bill, Young said he had given USFWS the opportunity to address the strict liability issue in the regulatory process and they failed to do so. He defended his actions by bringing up the 1995 Dixie, Florida baiting case, saying that "the present regulations make people criminals."

In late April of this year, the House Resources Committee approved Young's modified baiting "reform" bill.

#### *Muffling Dissent*

Federal law enforcement officers contend that the proposed regulatory and legislative changes would, among other things, erase decades of case law that have aided in the prosecution of hunters who shoot birds over bait; it would place further burdens on Federal wildlife officers, at a time when there are already too few of them in the field enforcing the law; and it would drastically reduce game bird populations, undermining the very spirit and intent of the wildlife protection statute.

If enacted, they argue, the new rules would take the sport out of hunting—fair chase would become nonexistent; high numbers of birds would be killed in a short period, shot while eating and accustomed to the presence of humans. "Slob hunters

could lure birds with piles of food and shoot them at point-blank range," noted an agent. "There might be more challenge in shooting caged birds in a pet store."

The freedom to speak their minds honestly and openly is unfortunately not an option for these public servants. In addition to repeated threats from Congressmen to "punish" agents for discussing their personal views on baiting, the USFWS has also issued what amounts to a gag order on its officers.

Special agents have been formally warned not to have any contact with outside groups on this hot-button issue. A memo, circulated a few days prior to public notification on the proposed rule change, advised the agents to, in part:

"Feel free to discuss among yourselves, but don't get caught going outside the agency. . . . Congressman Young and Senator Breaux gave Director Clark a very difficult time over the fact that some agents were believed to be lobbying against the draft Migratory Bird Treaty Reform bill. Young made it clear that he will hold hearings and agents accountable if they lobby against the bill and get caught. . . . be careful. . . . [He] means business. . . ."

The agency may insist that this order is meant to protect employees, but as one agent put it, "With all the threats and intimidation, there are those of us who feel a bit like a scared rabbit, with the hawk circling our head just waiting for us to make the mistake of sneaking out of the bushes by going public."

The message USFWS agents would like the public to hear in regard to attempts to liberalize baiting regulations is simple: Protection of the resource should be the primary objective here instead of increasing kills. After committing themselves to the pursuit of this cause, day in and day out in the field, they are understandably disappointed that their agency is more concerned with its own self-protection than it is for the protection of migratory game birds.

Some agents maintain a fatalistic attitude about the ultimate impact of impending changes in the MBTA law. "Maybe we shouldn't worry about the baiting regulations," suggested an agent. "When the ducks end up on the endangered species list, we can finally go back to protecting them."

